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Tiivistelmä – Referat – Abstract

The Energy Charter Treaty (ECT) is a multilateral investment treaty with over 50 contracting parties that solely concerns the energy sector, which is of crucial importance in combatting climate change. Further, more investor claims have been brought forward under the ECT than under any other investment agreement, and some of the largest arbitral awards have been rendered under its auspices. These factors combined make the ECT a very significant instrument for the global climate as a whole.

This paper is based on the premise that more and more countries would wish to cut back on their use of highly polluting fossil fuels to produce energy. However, it is often argued that the investment protection clauses, which are also included in the ECT, cause 'regulatory chill', meaning that states are wary of passing stricter regulations, as such measures might well result in investor-state dispute settlement proceedings. Therefore, it is plausible that the investment protection clauses of the ECT are in fact slowing down the transition from fossil fuels to renewable forms of energy, and various NGOs in fact view the ECT solely as a tool of the fossil fuel industry used for this purpose.

In this paper, I challenge such simplified take on the ECT and argue that states are in fact able to pass stricter regulations to protect the environment without breaching their ECT obligations towards foreign investors, and further, also should do so. This paper can most readily be described as a doctrinal research, as it concerns specific treaty provisions and all the claims made within it can be traced back to formal legal sources. In particular, I have relied on the texts of the ECT framework, and various judicial decisions. Therefore, large parts of this paper are comprised of treaty interpretation and analogic reasoning. The precise questions to which I have sought answers using these methods are: 1) What are the environmental aspects of the ECT; 2) Can the ECT, in its current form, be interpreted and applied in an environmentally sustainable way, and if so, how this could be done; 3) Why the ECT should be interpreted and applied in such way; and 4) Does the ECT require amendments to its current text?

It is well known that the ECT framework contains a plethora of environmental provisions, however, due to their soft formulation, they are often overlooked as it would be difficult to find a state to be in breach of them. According to the findings of this paper this is, however, erroneous. Based on the sheer volume of environmental provisions, and the great significance placed upon them within the Preamble of the ECT and European Energy Charter, I have developed a novel, more balanced, take on the object and purpose of the ECT, which places significance on both the protection of investments and environment, unlike the tribunals applying the ECT have thus far done. Furthermore, I have found that despite the soft formulation of the environmental provisions, a state may still rely on them when responding to investor claims. However, the degree to which a state can do so depends greatly on the claims made – the text of the ECT places little to no significance to environmental matters in cases of alleged expropriation, whereas on alleged breaches of e.g. the FET standard environmental matters may be of great significance. Additionally, the text of the ECT allows for a state to argue that measures to protect the environment fall under the allowed exceptions of the ECT.

Having identified the various environmental aspects of the ECT, and developed techniques for responding states to utilise them, I have also discussed why the presented findings should be applied, and whether it would be enough. It is evident that matters such as sustainable development and protection of the environment are gaining foothold within the law both on national and international level. As the ECT is not situated in a void, these global trends should be considered when applying it. As the findings of this paper would encourage states to pass legitimate measures for the protection of the environment, there are relatively clear policy reasons as to why the application of the findings would be desirable.

Many of the findings made in this paper were reached through teleological interpretation of the ECT. While such interpretative approach is perfectly valid, it would nevertheless be beneficial for the text of the ECT to be amended to explicitly incorporate the interpretations made within this paper. Amending a multilateral treaty such as the ECT is, however, difficult. Therefore, the findings of this paper can be of great importance for states wishing to pass measures to protect the environment, as they offer greater certainty of the legality of their actions towards foreign investors.

Avainsanat – Nyckelord – Keywords
Energy Charter Treaty, Investor-State Dispute Settlement, Expropriation, Fair and equitable treatment, Treaty interpretation, International Investment Law, International Environmental Law, Sustainable development, ECT, ISDS, FET

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Master's Thesis
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Abbreviations

Article	Art
Comprehensive Economic and Trade Agreement	CETA
Energy Charter Treaty	ECT
Environmental Impact Assessment	EIA
European Convention on Human Rights	ECHR
European Court of Justice	ECJ
European Energy Charter	Charter
European Union	EU
Fair and Equitable Treatment	FET
General Agreement on Trade and Tariffs	GATT
International Centre for the Settlement of Investment Disputes	ICSID
International Court of Justice	ICJ
International Law Commission	ILC
Investor-State Dispute Settlement	ISDS
Non-Governmental Organisation	NGO
North American Free Trade Agreement	NAFTA
Organisation for Economic Co-operation and Development	OECD
Permanent Court of Arbitration	PCA
Permanent Court of International Justice	PCIJ
Protocol on Energy Efficiency and Related Environmental Aspects	PEEREA
Stockholm Chamber of Commerce	SCC
Treaty of Rome	EEC
United Nations	UN
United Nations Conference on Trade and Development	UNCTAD
United Nations General Assembly	GA
Vienna Convention on the Law of Treaties	VCLT
World Trade Organization	WTO

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1. Introduction

1.1. Introduction to the thesis

"The Contracting Parties to this Treaty,

Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes,

Have agreed as follows"[1]

The production of energy is among the key drivers of greenhouse gas emissions, and thus of climate change. The majority of the world's energy is still produced through highly polluting fossil fuels, and as the demand for energy is continuously increasing, it is evident that states need to make considerable changes to their energy policies and hasten the transition to renewable forms of energy.[2] The energy sector, however, is a powerful actor in the formulation of these policies, and thus in combatting climate change.[3] A key instrument connected to the energy policies of states' is the Energy Charter Treaty ("ECT" or "Treaty"), a multilateral agreement covering the entire energy cycle with numerous rules concerning trade and investments in energy.

The Energy Charter Treaty lies at the centre of this paper. The importance of the ECT is immense: It has over 50 contracting parties, and concerns solely the energy sector, a field that is critical to the security and economy of every state, and the climate of the entire world.

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[1] Energy Charter Treaty, Preamble

[2] According to the International Energy Agency (IEA), the global demand for energy and global energy-related CO2 emissions had reached the historical peak right before the Covid-19 crisis hit. Further, the IEA projects that while the total energy demand will be considerably lower in 2020 relative to 2019, the demand for renewable sources of energy would grow. The demand for every other primary source of energy is projected to fall, with the projected demand for oil (-9.1%) and coal (-7.7%) falling the most. See International Energy Agency, *Global Energy Review 2020* (IEA, Paris 2020), accessed at <https://www.iea.org/reports/global-energy-review-2020> on 28 July 2020.

It is uncertain whether such trends will continue should the economic activity normalise eventually. However, the Global Energy Review 2020 also shows that the demand for coal within the European Union was already declining before the Covid-19 crisis hit. The European Union and its member countries constitute a large part of the Energy Charter Treaty contracting parties. Therefore, it is possible that the global pandemic ends up hastening the transition towards sustainable forms of energy, and away from coal and oil in particular. If this is indeed the case, the pandemic may well have significance in various disputes under the Energy Charter Treaty.

[3] Lotta Aho, *Whose game, whose rules: Neoliberal hegemony and corporate power in climate change governance: Exploring the outcome in the energy sector* (Doctoral Thesis, Aalto University publication series 95/2020) 14-31

Furthermore, the ECT has been used as a successful tool by the fossil fuel sector to combat state measures to protect the environment,[4] is among the most litigated treaties, with some of the highest arbitral awards rendered under its auspices.[5] The combination of these factors has led to calls from various NGOs that states should withdraw from the ECT,[6] with Russia and Italy already having withdrawn from the Treaty.

This paper examines the environmental aspects of the ECT and aims to decipher if the provisions of the ECT could in fact be used to defend states' environmental measures, rather than merely be relied upon by fossil fuel companies, and if so, how and why this could be done. Although the ECT is a highly litigated instrument, and is undeniably influential for the environment, the tribunals applying it have seldom had the chance to consider the environmental aspects of the treaty and never in a dispute arising from state measures to protect the environment.[7] There are, however, several publicly known disputes arising from state measures to protect the environment currently ongoing, which makes the need to investigate the significance of the environmental aspects of the ECT all the more pressing.

1.2. Premise, Research Questions and Limitations

This paper is based on the premise that the ECT contracting parties have a desire to pass stricter laws for the protection of the environment,[8] despite the fact that such regulations might have adverse effects on foreign investors or on their own economies on a short term. This premise somewhat flips the situation of a 'typical' environmental dispute, in which a state would argue that it has met the minimum requirements of protecting the environment. This paper concerns situations where the state asserts that its right to surpass the minimum requirements does not necessarily contradict any of the legal rights of foreign investors. It is

[4] In *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 ("Vattenfall v. Germany (I)") the state withdrew its environmental regulations as the Swedish energy corporation Vattenfall alleged that the regulations breached its rights. Even a threat of ECT proceedings might force a state into 'compliance' with the interests of the energy company suggesting making such a claim, as was apparently the goal of the energy company Uniper, of which the Finnish company Fortum is the majority owner, regarding the Netherlands' upcoming ban on burning coal for energy production. As the Netherlands did not withdraw the legislation, it is likely that an ECT tribunal will eventually consider the situation. See: Yamina Saheb, 'Europe's Green Deal is under threat from Energy Charter Treaty' (*Euractiv*, 20 September 2019), accessed at <https://www.euractiv.com/section/climate-environment/opinion/europes-green-deal-is-under-threat-from-energy-charter-treaty/> on 25 June 2020.

[5] Yukos cases, (PCA Cases Nos. AA 227; AA 226; and AA 228) where the state was ordered to pay over $50 billion to the investors.

[6] See, the Open letter on the Energy Charter Treaty, signed by a large number of NGOs, accessed at https://www.asso-sherpa.org/open-letter-on-the-energy-charter-treaty-ect on 7 July 2020.

[7] Several cases have been lodged because of such measures, but the disputes are either ongoing or were settled by the parties. These cases are discussed below.

[8] The EU has, in particular, been vocal about its concerns regarding the environment as will be discussed below in this paper.

plausible that such situations will become more commonplace as climate change progresses, and its effects become ever more evident.

Although several non-governmental organizations ("NGOs") view the ECT solely as a tool used by fossil fuel companies[9], several authors have, in fact, asserted that the environmental aspects of the ECT could have significance in ECT disputes.[10] However, this assertion has not been looked at in-depth by either the authors themselves or the arbitral tribunals applying the ECT, with it commonly receiving merely a passing mention of such possibility. This thesis aims to prove the assertion that the environmental aspects can indeed have significance in dispute settlement, even if the Treaty does not say so explicitly. To do so, I have interpreted the relevant provisions of the ECT framework and distilled a coherent interpretation of the Treaty that enables states to rely on the environmental aspects of the Treaty when responding to investor claims. Secondly, I have formulated applications utilising the novel interpretation to combat the most common investor claims and discussed why it should be applied by the states and tribunals applying the Treaty. Finally, I have considered whether the approach presented is sufficient to ascertain sustainability, or if the Treaty requires amendments. Thus, the research questions of this paper can be presented as follows:

1) What are the environmental aspects of the Energy Charter Treaty framework?
2) Can the Energy Charter Treaty, in its current form, be interpreted and applied in an environmentally sustainable way, and if so, how this could be done?
3) Why the Energy Charter Treaty should be interpreted and applied in such way?

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[9] As the ECT contains several provisions regarding the treatment of investors, an investor may under the ECT challenge state measures that it considers to be in breach of the state's obligations towards the investors. Foreign investors have successfully managed to get states to backstep on their environmental regulations or claimed compensations on both real and hypothetical losses that such regulations would cause.

[10] E.g. Craig S. Bamberger, 'An Overview of the Energy Charter Treaty' in T.W. Wälde (ed) *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer Law International Ltd 1996) 20. While discussing litigation concerning Article 19, Bamberger states that "the absence of ECT dispute resolution does not eliminate the possibility that it might be cited in dispute resolution concerning other articles."

Wälde & Kolo state that the "environmental standards recognised in the treaty are suitable to serve as factors to be taken into account… They help to define the legitimacy of environmental policies underlying national regulation." See Thomas Wälde & Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' (2011) 50 Int'l & Comp LQ 811, 817.

Martles states that it " would be a mistake to deduce from this limitation [Article 19 being outside the scope of Article 26 disputes] that the environmental aspects of the ECT present in Article 19 have no role to play in Article 13 disputes centered on expropriation via environmental regulation." Martles further adds that "Together with Article 18(1), Article 19 offers state respondents the ability to counter some investor claims of regulatory expropriation." See Justin R Martles, 'Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law' (2007) 16 J Transnat'l L & Pol'y 275, 319-320.

4) Does the Energy Charter Treaty require amendments to its current text?

These questions are of increasing importance, as it is likely that states would wish to pass more such environmental regulations.[11] Yet, the most common interpretation of the ECT could very well cause a regulatory chill, i.e. states would not pass such regulations due to fears of investor claims. Therefore, it is important to formulate novel approaches to the ECT, that would allow the states more policy room while respecting the rights of the investors.

As the ECT, in practice, is interpreted in the context of investor-state disputes almost exclusively[12], this paper follows the same approach, namely a major part of the discussion of the environmental aspects of the Treaty is mirrored to the investment protection provisions of it. Further, when formulating litigation techniques that apply the findings made regarding the first research question, I have focused on arguments suited for the responding state, and on the merits phase. It is certainly possible for an investor to argue based on the environmental aspects of the Treaty, or for these aspects to have significance during the jurisdiction phase of the dispute. However, such situations seem less plausible and the formulation of the arguments would be considerably different.[13]

1.3. On Methodology, Analogical Reasoning and the Significance of Case Law

There is no single correct methodology to the research of public international law, or law in general, but rather a wide variety of applicable methodologies, of which it is each author's own decision to apply one or more of them.[14] Koskenniemi, on the methodology of international law, has stated that the question boils down to "how to convince this audience, here and now?".[15] Although Koskenniemi's advice might have been steered more towards the practitioners of international law, it nevertheless applies to research as well – the research of international law aims to craft a persuasive, legal argument.[16] As this paper concerns

[11] E.g. In 2019 the Netherlands passed a law aiming at phasing-out coal as a source of energy. It seems likely that this law will be challenged by foreign investors. See, Edwin van der Schoot, 'Claim om kolenverbod voor Staat' (Telegraaf, 5 September 2019), accessed at https://www.telegraaf.nl/financieel/1134267479/claim-om-kolenverbod-voor-staat on 7 July 2020.
[12] As of 27 July 2020, there are no publicly known inter-state disputes concerning the ECT. The Energy Charter Secretariat, in their day to day functioning, naturally does not solely consider disputes. However, the focus of this paper is in the disputes, and as such, the day to day functioning of the Energy Charter Secretariat receives little attention.
[13] Such situations will be discussed briefly below in this paper.
[14] Martti Koskenniemi, 'Methodology of International Law' (2007) Max Planck Encyclopedias of International Law [1, 25], Ari Hirvonen, 'Mitkä metodit? Opas oikeustieteen metodologiaan' (2011) Yleisen oikeustieteen julkaisuja 17, 7-9
[15] Koskenniemi, (2007) [25].
[16] Ibid, [1].

questions such as how the Energy Charter Treaty should be interpreted and applied, I have relied mostly on the methodology of *doctrinal research*.

Traditionally, doctrinal research has a dual purpose – the interpretation and systematisation of existing law, and the subject of research are various legal norms[17] essentially meaning, that the statements made in a given text or argument are connected to formal legal sources.[18] In public international law the formal sources of law can be derived from the Statute of the International Court of Justice ("ICJ"), Article 38(1)[19] according to which the sources are 1) treaties; 2) customary international law; 3) general principles of law; and 4) judicial decisions and teachings of the most highly qualified publicists as a subsidiary means of determining the rules of law.[20]

As I have mainly relied on the doctrinal approach, the arguments relating to the interpretation[21] and application of the law need to be connected to the aforementioned sources; the actual provisions of the ECT framework naturally being the priority, as any research into particular treaty provisions which fails to consider the provisions in question would be a near pointless exercise. Customary international law and the general principles of law, on the other hand, have received considerably little attention in this paper – this is natural, as the research is of a treaty. Of the abovementioned sources, judicial decisions have a somewhat peculiar significance in international law. As this paper refers to a number of cases from a variety of courts and tribunals, it is necessary to briefly discuss the significance of preceding case law and analogic reasoning in international law, particularly so, as several of the referred cases may not be formally connected to the ECT framework at all.[22]

[17] Hirvonen, (2011) 23-25
[18] Koskenniemi, (2007) [7] – [13]
[19] Ibid.
[20] ICJ Statute Art 38(1) reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[21] Treaty interpretation is discussed in length under Section 2.2.
[22] E.g. NAFTA disputes, which concern an entirely different treaty, with entirely different contracting parties.

First of all, it is clear that arbitral tribunals, and other fora of international law, are not bound by previous cases adjudicated in any forum, whether it be national or international.[23] This rule was well articulated by the tribunal in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, which stated that:

> "[T]here is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals."[24]

This, however, by no means implies that previous decisions and awards rendered in various cases would be insignificant for arbitral tribunals. A cursory view of almost any given arbitral award reveals that the tribunals pay close attention to the works of other similar *ad hoc* tribunals, and at times to the jurisprudence of other international actors such as the ICJ or the World Trade Organization ("WTO"),[25] or even to the jurisprudence of regional or national courts.[26] The arbitral tribunals are naturally also allowed to rely on such decisions. As mentioned, Article 38 of the International Court of Justice[27] states that:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> …
>
> (d) subject to provisions of Article 59[28], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law."[29]

Thus, the judicial decisions of various courts and tribunals have an important role in the practice of arbitral tribunals as a subsidiary means for determining the rules of law. As courts and tribunals frequently utilise this approach to determine the rules of law applicable to the

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[23] Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge University Press 2015) 138-139; Richard C Chen, 'Precedent and Dialogue in Investment Treaty Arbitration' (2019) 60 Harv Int'l LJ 47, 54

[24] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections and Jurisdiction [97].

[25] Vadi (2015) 144-158

[26] Ibid 159-162

[27] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2019) 19-20

[28] Article 59 confirms that the Court's decisions are only binding in the context of that particular case, and only between the parties of said case.

[29] Statute of the International Court of Justice, Article 38(1)(d)

situation at hand, any such reasoning is analogical by nature. For this approach to work, the case law to be referred must have similarities to the case at hand, i.e. the cases need to be analogous with each other. Levi articulated the principle of analogical reasoning in law with great clarity, writing that:

> "It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case."[30]

Arbitral tribunals often invoke such analogical approach, and understandably so, as the various investment treaties often utilise similar language or concern similar situations.[31] Arguably the application of analogical reasoning and precedence creates coherence in international law[32] and thus allows for greater predictability, accuracy and legitimacy of arbitral awards.[33] Analogical reasoning, however, has certain caveats to its usefulness. As Samuel has argued, there is no reliable method in which the similarity or the difference of things could be tested.[34] As analogical reasoning is based on the notion of similarity between cases, yet there is no test to determine whether the cases are actually sufficiently similar to justify analogical reasoning, some arbitrariness can easily remain in the reasoning process, as the arbitrators choose which cases and paragraphs are considered to be analogous with the current case, which may lead to 'cherry-picking' – choosing the cases they are most familiar with or that are supportive of their own stance while ignoring others.[35]

Throughout this paper I have utilised analogical reasoning and case law when discussing the provisions of the ECT. In essence, the cases referred can be divided into two categories that concern: 1) similar or identical concepts of law, e.g. fair and equitable treatment or expropriation; or 2) similar broader themes, e.g. the protection of the environment or sustainable development. It cannot be overstated that neither case law nor analogies are binding to tribunals interpreting and applying the ECT. In fact, I argue throughout this paper that the established practice within the ECT regime does not give sufficient significance to

[30] Edward Hirsch Levi, 'An Introduction to Legal Reasoning' (1948) 15 University of Chicago Law Review 501, 501-502
[31] Vadi (2015) 139-140
[32] Ibid 17
[33] Chen (2019) 57-62
[34] Geoffrey Samuel, 'Taking Methods Seriously (Part One)' (2007) 2 J. Comp. L. 94, 104
[35] Vadi (2015) 164

environmental aspects in light of the actual provisions of the Treaty itself. Thus, a tribunal relying too much on analogical reasoning and non-binding precedence might in fact simply be repeating old mistakes.

Having discussed various aspects of the doctrinal methodology, it is worthwhile to mention that at times I steer away from such methodological uniformity. During certain sections of this paper, I have considered the policy implications of the legal interpretations and arguments presented. In such sections, I have utilised tools from other methodological approaches, e.g. a modified version of the classical prisoners' dilemma – a tool that is used mainly in connection with utility and game theory, and thus is useful in discussing the economic or policy aspects of a given issue.

In the following chapter, I set the legal framework, within which the interpretations of the ECT are done. This takes place mainly in Chapter 2 under which I discuss the ECT and its investment protection provisions on a general level and treaty interpretation. The framework of environmental provisions is discussed under Chapter 3 in parallel with interpreting them. This structure is chosen, as the interpretation and application of the ECT is usually done in the context of investment protection. Thus, even though this paper mainly concerns the environmental aspects of the Treaty, the investment protection provisions set the correct framework.

2. Legal Framework

2.1. Energy Charter Treaty

2.1.1. Introduction

In the late 1980s and culminating in 1989, the Soviet Republics in Eastern and Central Europe each overthrew their Moscow-backed governments in a series of events[36] also referred to as "The End of Communism."[37] While the former communist states were preparing for the transition into market economy-based systems[38], the Western European countries had concerns regarding the diversification of their own long-term energy supplies.[39] These concerns were first combined at the European Council meeting in Dublin on 25 June 1990, where the Dutch representative presented a memorandum titled "European Energy Community"[40], the idea of which was in essence to secure the flow of capital to the Eastern countries and the flow of energy to the Western countries.[41] This memorandum is understood to be the beginning of the process towards the European Energy Charter[42], adopted at the Hague on 16-17 December 1991 (the "Charter"), and later the Energy Charter Treaty, which opened for signatures on 17 December 1994.[43]

Thus, it is clear that the Treaty was crafted in times of transition, and to meet concrete interests both in the West and the East. As can also be seen, the timeline of the process is fairly short – from the inception of the idea in 1990, through political declaration in 1991, to a binding treaty with over 50 state parties in 1994 was remarkably fast. As a result of the pace, the adopted Treaty is rather user-unfriendly and contains some ambiguities. However, the alternative may have well been a failure in the negotiations.[44]

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[36] A brief timeline of the events: Institutions, '1989: The year of revolutions – a look back 20 years on' (European Parliament, 27 August 2009), accessed at <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20090826STO59792+0+DOC+XML+V0//EN> on 27 July 2020

[37] Aline Sierp, 'Democratic Change in Central and Eastern Europe 1989-90 – The European Parliament and the end of the Cold War' (2015) European Parliament History Series 20-36

[38] R.F.M. Lubbers, 'Foreword' in T.W. Wälde (ed) *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* ((Kluwer Law International Ltd 1996) xiii

[39] Ibid; Sussman (2008) 391-392

[40] Bulletin of the European Communities No 6, Vol 23 1990 13

[41] Tim Maxian Rusche, *EU Renewable Electricity Law and Policy – From National Targets to a Common Market* (Cambridge University Press 2015) 166

[42] The European Energy Charter will be discussed in greater detail under Chapter 3 – although the Charter itself is non-binding, the Treaty makes several references to it, thus placing significance to it.

[43] R.F.M. Lubbers (1996) xiii; Bamberger (1996) 2

[44] Bamberger (1996) 2-3

The Energy Charter Treaty is a unique and complex[45] multilateral investment treaty, which solely concerns the energy sector.[46] Currently, the Treaty has fifty-three[47] signatories and contracting parties, mainly countries of Western Europe and of the former Soviet Union, but also countries such as Japan and Australia.[48] Although the ECT also concerns matters not related to investments, it can nevertheless be called an international investment treaty.[49] International law on foreign investments concerns situations where "tangible or intangible assets are transferred from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."[50] In other words, assets move from one jurisdiction to another. Were there no specific rules to govern such situations the host state of the investment could, in principle, nationalise the investment with little to no cost.[51] Such situation is clearly undesirable for capital exporting states, so they have developed legal techniques to protect the interests of their nationals, who may wish to avoid the application of host state law and their national courts.[52] Below, I discuss some of these legal techniques that are incorporated in the ECT.

[45] Bamberger, who acted as the chair of lawyers that participated in the negotiations, described the ECT as a complex and un-user-friendly instrument - in addition to the text of the Treaty itself, the ECT framework contains several Annexes; Conference Decisions; Understandings; Declarations, The European Energy Charter; The International Energy Charter; the Amendment to the Trade-Related Provisions of the Energy Charter Treaty of 24 April 1998 and the Protocol on Energy Efficiency and Related Environmental Aspects ("PEEREA") of 17 December 1994. Bamberger (1996) 2; www.energycharter.org accessed on 2 March 2020

[46] Bamberger (1996) 1

[47] Including the European Union and Euratom, more on the parties at: www.energycharter.org, accessed 2 March 2020

[48] Edna Sussman, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' (2008) 14 ILSA J Int'l & Comp 391, 392

[49] Thomas W. Wälde, 'Energy Charter Treaty-Based Investment Arbitration: Controversial Issues' (2004) 5 J World Investment & Trade 373, 378

[50] M. Sornajah, *The International Law on Foreign Investment* (Cambridge University Press 2010) 8

[51] Charter of Economic Rights and Duties of States, General Assembly resolution 3281 (XXIX) adopted on 12 December 1974, by 115 votes to 6, with 10 abstentions, Article 2.1 states that "*Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities"* and further in Article 2.2(c) that "*Each State has the right to nationalize, expropriate or transfer ownership of foreign property…"*

Although General Assembly resolutions are not binding on the states per se, they may nevertheless provide a basis for the development of law. Thus, the aforementioned General Assembly resolution 3281 may well have acted as an incentive for capital exporting states to create specific rules. More on the status of General Assembly resolutions: Crawford (2019) 39-40

[52] Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011) 3-4

2.1.2. Overview of the Protection of Investments under the ECT

Although the focus of this text is on the environmental aspects[53] of the ECT, it is nevertheless important to also investigate the aspects of the ECT relating to the protection of investment, as this thesis specifically concerns the significance of the environmental aspects in litigation, and most, if not all, ECT litigation takes place in investor-state disputes. In this section I discuss Articles 10, 13 and 26 of the Treaty, knowledge of which will be of aid when discussing litigation techniques under Chapter 4 of the thesis. Literature concerning the ECT is often focused on the investment protection aspects of the treaty. Compared to such presentations, this section will be kept relatively brief.

States have several obligations towards investors under the ECT regime. The key obligations are found in Articles 10 and 13 of the ECT. Consequently, most of the known disputes also concern alleged breaches of these articles.[54] There are also no clear thresholds that would indubitably prove that either Article 10 or 13 would have been breached, or whether certain conduct breaches Article 10 or 13. It is important to note that the investment protection clauses only cover legitimate expectations[55] and interests of the investors. For example, an investor cannot legitimately expect that their illegal activities would be protected under such clauses[56] or that the host state would cease regulating.[57]

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[53] The environmental aspects of the ECT are discussed in length in Chapter 3.

[54] Of the cases where an award has been rendered, over 80% concerned an alleged breach of either of these articles based on ECT Secretariat data.

[55] Philip Morris SARL v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016) [426]: "It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law."

The significance of specific commitments by the host state regarding legitimate expectations has also been investigated in several ECT cases, e.g. *Blusun S.A., Jean Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016), or the Spanish solar cases.

The term "Spanish solar cases" is at times used to refer to a series of investor claims against Spain resulting from its changes to the renewable energy incentives program.

[56] Wälde (2004) 387

[57] Rule that has been confirmed in several arbitrations under the ECT. E.g. *AES Summit Generation Limited and AES-Tisza Erömü Kft. V. Republic of Hungary*, ICSID Case No. ARB/07/22 and *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) [2.27, 7.75].

In the NAFTA case Feldman v. Mexico, which is at times referred to by ECT tribunals, the arbitrators, while acknowledging that states have several ways to force a someone out of business, but "At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary

Article 10 concerns the promotion, protection and treatment of investments, and it has 12 paragraphs. The first paragraph, however, contains the core of Article 10:

> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."[58]

The six key obligations regarding the standard of treatment and protection of investments that are spelt out above are 1) the non-discrimination, 2) fair and equitable treatment, 3) most constant protection and security, 4) *pacta sunt servanda*, 5) treatment no less favourable than international law and treaty obligations, and 6) no unreasonable impairment.[59] It is clear from Article 10 that there is no such rule that would prohibit all state measures that might conflict with the interests of investors. Whereas most of the obligations are relatively straightforward, the most ambiguous obligation within Article 10 is the fair and equitable treatment (FET) standard. Regarding the FET standard, it can be said that Article 10 obligates states to act towards their investors in good faith in a manner that is transparent, consistent with due process, and not arbitrary, unjust or unfair. Furthermore, a state should maintain legal stability[60], and must not violate the investors' legitimate expectations.[61] Effectively Article 10 means that a state must treat foreign investors as they would national actors. States may regulate, but such measures must not affect foreign investors discriminately, and state

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international law recognizes this." *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) [103]

[58] ECT Article 10(1)

[59] Wälde (2004) 380

[60] Elizabeth Whitsitt and Nigel Bankes, 'The Evolution of International Investment Law and Its Application to the Energy Sector' (2013) 51 Alta L Rev 207, 223-224

[61] Lise Johnson, 'International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It' (2009) 39 Envtl L Rep News & Analysis 11147, 11152-11153

measures must be reasonable. The scope of FET-standard is unclear, especially when formulated in an unqualified manner[62] as is done in the ECT. [63] However, it is clear that the standard is an 'evolutionary' one – tribunals interpret FET standard through a contemporary lens. They do not try to consider what would have been fair or equitable in the time of ratifying the Treaty.[64] Practice has shown that FET standard formulated in such way lends itself to practically any type of case.[65]

Arguably, such open-ended formulation reflects the principle of equity, which is discussed below, meaning that the conduct of a state must be fair and equitable towards the investor and vice versa, as noted in the United Nations Conference on Trade and Development ("UNCTAD") report:

> "The concept of equity and equitable treatment will need to take into account, not only the interests of investors, but those of the host State as well, calling for an appropriate balance between various legitimate interests involved. The appropriateness of the proportionality principle and balancing through partial compensation could be explored as possible tools to help in this process."[66]

The significance of equity in general international law is unclear, outside the thus far never-applied Article 38(2) of the Statute of the ICJ, which allows for the court to decide a case *ex aequo et bono*, if the parties agree thereto.[67] Hudson, in his Individual Opinion on *The Diversion of Water from The Meuse*, discussed equity and argued that the tribunals and courts have some freedom to consider the principles of equity as part of applicable international law.[68] Thus, the unqualified formulation of the FET standard in the ECT seems to ascertain the status of equity as a treaty rule, rather than a general principle of law.

It is important to note, that Article 10 obligations are not absolute as they are subject to some of the exceptions of Article 24. The legitimacy of state interests may also be relevant in

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[62] UNCTAD, 'Fair and Equitable Treatment', (2012 United Nations) 1
[63] ECT Article 10(1): "commitment to accord … fair and equitable treatment."
[64] Wälde (2004) 385
[65] UNCTAD (2012) 43
[66] Ibid 77
[67] ICJ Statute Article 38(2). Essentially this means that if the parties agree, the ICJ may decide a case solely on the basis of what they consider to be fair, rather than rely on sources of law listed in Article 38(1) of the ICJ Statute.
[68] PCIJ, *Diversion of Water from Meuse (Netherlands. v. Belgium)*, Judgment (28 June 1937) [321-323]

determining whether the article has been breached or not.[69] On the other hand, Article 13 is much stricter and more absolute, as will be discussed next.

Article 13 concerns expropriation and states in its first paragraph that:

> "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
>
> (a) for a purpose which is in the public interest;
>
> (b) not discriminatory;
>
> (c) carried out under due process of law; and
>
> (d) accompanied by the payment of prompt, adequate and effective compensation."[70]

As can be clearly seen from the article, states retain their sovereign right to expropriate or nationalise private property. However, the Treaty sets both material (non-discrimination and public interest) and procedural (due process and compensation) limitations to the states' ability to exercise this right. If a given measure or a set of measures taken by a state fulfils the criteria of expropriation, then a state must pay compensation.[71]

The Treaty is clear that measures that have the same effect as direct expropriation, also called indirect expropriation[72], trigger the same compensation obligations.[73] Yet the Treaty remains silent as to what exactly qualifies as either direct or indirect expropriation. However, there has been a significant amount of discussion regarding the very question, both in arbitration proceedings and academia. Wälde and Kolo, in their somewhat pointed article[74], discuss the line between a 'normal' environmental regulation and a compensable 'regulatory taking'

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[69] E.g. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) [372]:
"Under a FET clause, a foreign investor can expect that the rules will not be changed *without justification of an economic, social or other nature.* Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze" (emphasis added).
[70] ECT Article 13(1)
[71] ECT Article 24(1), which concerns exceptions to the treaty provision states that:" This Article shall not apply to Article 12, 13 and 29." Thus, no exceptions apply when a state has expropriated investor's property.
[72] Wälde (2004) 402-404
[73] ECT Article 13
[74] Wälde and Kolo describe the environmental cause as a "Trojan horse" being used to further socialist attitude and to oppose trade and investment liberalisation. Wälde & Kolo (2001) 811-812

under the ECT, stating that the balancing process is not easy, but that the environmental aspects of the Treaty are suitable to be used in the balancing process.[75]

Although the existence of expropriation must be examined case by case, certain factors can be deduced regarding expropriation: it is not necessary for a state to actually assume ownership of the investors' assets for there to be expropriation[76]; for there to be expropriation without nationalisation, the value of the investment must be significantly diminished due to state measures[77], and therefore even an otherwise drastic drop in value does not necessarily constitute expropriation; and, even a perfectly legitimate regulation for laudatory purposes may constitute compensable expropriation, if the costs should be borne by the community, rather than by the investor.[78]

Article 26 is the basis for Investor-State Dispute settlement under ECT and contains an Investor-State Dispute Settlement ("ISDS") clause[79], which are a relative novelty in international law as they bestow direct rights to individuals[80], and they allow investors to utilise international arbitration against the host states for alleged breaches of obligations. ISDS-clauses are now a key feature of foreign investment law, a recent large sample survey by Organisation for Economic Co-operation and Development ("OECD") found that 93% of bilateral investment treaties[81] contain language on ISDS.[82] Below, I have presented a somewhat simplified picture of Article 26 and its contents.

Article 26 concerns the settlement of disputes between investors and contracting parties. In paragraph 3 of the Article, states give their "unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article."[83] Thus, there is no doubt on whether ISDS is available to investors under the ECT in

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[75] Ibid 817
[76] Wälde (2004) 402: "It is now generally recognized that governmental action can constitute a compensable expropriation even if no formal "taking" and transfer of ownership has taken place."
[77] *AES Summit Generation Limited and AES-Tisza Erömü Kft. V. Republic of Hungary*, Award (23 September 2010) [14.3.1]
[78] Wälde & Kolo (2001) 826-827
[79] ISDS is a highly controversial subject in international law for several reasons that fall outside the scope of this thesis. For example, Martti Koskenniemi has argued that ISDS-clauses in agreements between developed states essentially transfer regulatory powers from the government to the foreign investors. More on this: Martti Koskenniemi, *Statement to the Finnish Parliament regarding CETA* (13 March 2018) (in Finnish), accessed at <https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2018-AK-176559.pdf> on 3 March 2020
[80] Wälde (2004) 378
[81] Sample size of 1,660 BITs.
[82] Pohl, J., K. Mashigo and A. Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (2012) OECD Working Papers on International Investment, OECD Publishing 7
[83] ECT Article 26(3)(a)

general, however, as the focus of this thesis is in the environmental aspects of the Treaty, the matter becomes slightly less clear. According to paragraph 1 of Article 26, the ISDS-clause only applies to disputes concerning an alleged breach under Part III of the ECT.[84] Part III concerns investment promotion and protection, and covers Articles 10-17, and therefore, clearly excludes certain alleged breaches from its scope, e.g. breaches of environmental provisions found under Article 19 in Part IV. This wording does not, however, mean that environmental matters could not constitute a part of a dispute, as it remains a plausible scenario that an investor alleges state measures to protect the environment would breach their rights under Part III of the ECT. In such cases, environmental aspects will naturally be considered. This conclusion is further supported by paragraph 6 of Article 26, which states that:

> "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."[85]

The above paragraph further reminds the interpreters of the ECT that it is to be applied as a whole and not in isolation from the rest of the corpus of international law.

The wording of paragraph 1 of Article 26 does, however, mean that if an investor alleges that a contracting party is in breach of Article 19 for instance, but not any of the Part III articles, they would not be able to bring forward a case under Article 26 of the ECT.

Above I have presented an outline of the clauses most often invoked in ISDS proceedings under the ECT. These articles, and their relationship to environmental matters, will be returned upon under Chapter 4, while discussing litigation techniques. Below, I discuss the principles of treaty interpretation.

2.2. Treaty Interpretation

2.2.1. "Rules" of Treaty Interpretation – Vienna Convention on the Law of Treaties

Any document, treaties included, drafted by humans gives rise to some doubt or ambiguity regarding its meaning, content or scope and in order to solve these issues, a document

[84] ECT Article 26(1)
[85] ECT Article 26(6)

requires interpretation.[86] A treaty can be interpreted without application, but any application of a treaty presupposes interpretation.[87] The general rule of treaty interpretation was codified over 50 years ago in the Vienna Convention on the Law of Treaties ("VCLT" or "Vienna Convention")[88], yet the subject remains of high interest in literature[89] with many of the same questions regarding schools of interpretation still relevant.[90]

The VCLT contains the general "rule" of interpretation in its Articles 31-33.[91] The quotation marks surrounding the word "rule" are to show that there is no strict rule that could be applied to all interpretative issues.[92] Nevertheless, the drafters of the VCLT, despite at times doubting whether such rules even exist[93], managed to identify certain elements, which are now contained in the articles mentioned above.

The first paragraph of Article 31 reads as follows:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[94]

The paragraph lays out the principles of 1) good faith, flowing from the maxim of *pacta sunt servanda*; 2) that ordinary meaning is given to the terms of the treaty, which serves as the basis of textual approach; and 3) that the above does not happen in the abstract, but in the light of the context, and object and purpose of the treaty.[95]

The second paragraph sheds light to the point 3) above:

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[86] Oliver Dörr, 'Article 31. General rule of interpretation' in Oliver Dörr & Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 522
[87] Georg Schwarzenberger, 'Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convemtion on the Law of Treaties' (1968) 9 Va J Int'l L 1, 7-8
[88] VCLT Arts 31 and 32, which have since been widely recognised as reflecting the status of customary international law. E.g. Crawford (2019) 366
[89] Michael Waibel, 'Demystifying the Art of Interpretation' (2011) EJIL Vol. 22 No 2 571
[90] E.g. Oliver Morse, 'Schools of Approach to the Interpretation of Treaties' (1960) 9 Cath. U. L. Rev. 36, 39-42; and Malgosia Fitzmaurice & Olufemi Elias,'*Contemporary Issues in the Law of Treaties* (2005 Eleven International Publishing) 218-221. The works have 45 years in between them, yet both identify the same primary schools of interpretation.
[91] It is notable, that the VCLT and the commentary uses the word "rule" rather than its plural "rules", which is to mean that its application is a single combined operation. Thus, all aspects of article 31 ought to be applied when it is invoked in interpretation of a treaty provision.
Crawford (2019) 367
[92] Yearbook of the International Law Commission, 1966 vol. II 218-219
[93] Ibid
[94] VCLT Art 31(1)
[95] Yearbook of the International Law Commission, 1966 vol. II 221

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[96]

The paragraph aims to clarify what the context of a given treaty is comprised of. It is clear that the preamble and annexes to the treaty are comprised in the context of a treaty[97] and the paragraph also assigns significance to other instruments made in connection to the treaty and which are accepted as being connected to the treaty, in setting the context of the treaty. It is of particular importance that preambles are to be concerned in the interpretation of treaties – the preamble part of a treaty might often seem declaratory rather than binding. Yet, the explicit acknowledgement that the preamble is to be given interpretative weight means that the operative parts of a treaty should not be given a meaning that would be contradictory to the preamble.

The third paragraph adds further factors that are to be considered in the interpretation:

> "There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty;
>
> (b) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties"

Points (a) and (b) make good sense – the contracting parties' subsequent practice offers a clear implication of their intention and understanding regarding the treaty. Lord McNair, who was a sceptic regarding the value of the rules of interpretation,[98] nevertheless describes the

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[96] VCLT Art 31(2)
[97] Yearbook of the International Law Commission, 1966 vol. II 221
[98] McNair, *Law of Treaties, 1961*, (Oxford University Press 1961) 366

interpretative effect of subsequent practice as worthy to be called a rule and as good sense and good law.[99] Point (c) regarding any relevant rules of international law is a complex one.[100] Its aim is to maintain coherence in international law, as any situation may have several applicable laws.[101] Essentially the reference to applicable rules of international law makes sure that treaties are not interpreted in isolation from the broader context.[102]

In the fourth and final paragraph it is stated that special meaning can be given to a term, if it is established that parties have intended so.[103] Assigning special meaning to certain terms is a common practice in treaties. Usually treaties are very clear about when this is done – treaties often include several definitions and when certain terms in treaties have a capitalised first letter, it usually implicates that a special meaning has been given for the term within the treaty itself. Naturally it is possible to assign special meaning in other ways too, but in such situations the evidence of special meaning would be less evident.

Should the general rule of Article 31 leave the meaning of a treaty provision ambiguous, obscure, or lead to an absurd or unreasonable result, supplementary means of interpretation may be applied, as allowed by Article 32 of the VCLT:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
> (b) Leads to a result which is manifestly absurd or unreasonable."[104]

Whereas the aspects of Article 31 *must* always be considered when the article is applied in interpretation, the Article 32 may only be applied in situations where the application of Article 31 leads to unsatisfactory results. When considering the preparatory works, it may yield information at times on the intent of the drafters of a treaty regarding certain provisions.

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[99] Ibid 424
[100] More on Article 31(3)(c): Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (ILC 2006) 206-243
[101] Crawford (2019) 368-369
[102] Ibid
[103] VCLT Art 31(4)
[104] VCLT Art 32

However, in the context of the ECT, the usefulness of the *travaux préparatoires* is highly questionable.[105] The same holds true to multilateral treaties more widely as well.[106]

Article 33 concerns the interpretation of treaties that are authenticated in two or more languages. The first paragraph of the article is relevant for the ECT, and reads as follows:

> "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail."[107]

The ECT is rather clear on this particular matter, as in its Article 50 it is stated that the Treaty is signed in English, French, German, Italian, Russian and Spanish, and that each of these texts is equally authentic.[108] This adds a further layer of complication to the interpretation of the ECT. As the Treaty framework, which, as established, is a complicated whole, was drafted in a relatively quick schedule, and each of the six languages is equally authentic, there are bound to be differences between them, and no clear way to decide which version should prevail.[109]

Above I have briefly discussed the VCLT rules of treaty interpretation, which are commonly considered to be customary international law.[110] Despite this status, the VCLT Articles 31 and 32 are actually merely comprised of factors that are to be considered when interpreting a treaty. VCLT remains quiet as to what significance these factors are to be given and what is their relationship to each other, albeit highlighting the significance of the text. In fact, if solely the VCLT rule of interpretation is followed, the interpreter may be no closer to a definite interpretation than they were before the exercise, and another interpreter may reach the polar opposite interpretation through the application of the exact same set of rules.[111]

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[105] Roe and Happold have described the preparatory works of the ECT as "difficult to access, obscure and unhelpful", and further note that the value of a single delegation's papers is unknown, and that the most difficult issues are commonly tackled "off the record", thus leaving the preparatory works silent on such matters. Roe & Happold (2011) 32

[106] G.G. Fitzmaurice, 'Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 Brit YB Int'l L 3-4

[107] VCLT Art 33(1)

[108] ECT Article 50

[109] A comparison between these authentic texts could well yield several differences in tone or in substance, which could have effect in the application of the Treaty. E.g. in Article 24(3)(c) the English version speaks of "public order", whereas the French version uses the term "l'ordre public", a distinction which might lead to different interpretations, and which will be investigated under Chapter 4 when discussing Article 24.

[110] Crawford (2019) 366

[111] McNair (1961) 365; Although McNair naturally does not discuss the VCLT per se, the section concerns "so-called rules of interpretation" – a category under which VCLT certainly falls under.

Thus, it seems, that there must be more to the interpretation of treaties than the VCLT.[112] Below, I discuss some of the key methods, or schools, of treaty interpretation on which the VCLT remains silent.

2.2.2. Interpretation Beyond the Vienna Convention

The International Law Commission ("ILC)"), in its commentary to the draft articles on the Law of Treaties, notes that the identified principles and maxims of treaty interpretation "are for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document". The ILC further adds that "Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science."[113] Thus, it seems clear that the VCLT was never supposed to be the final say on treaty interpretation, but rather a collection of the aspects that could be agreed upon.[114] As VCLT did not create an absolute canon of interpretation, it is worthwhile to look into the pre-Vienna schools of treaty interpretation, as these approaches remain valid.

Essentially three main schools of interpretation can be identified: textual; the intention of the parties; and teleological.[115] These different approaches to interpretation are also acknowledged in the ILC commentary to the draft articles on Law of Treaties, which states that

> "Jurists also differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to: (a) The text of the treaty as the authentic expression of the intentions of the parties; (b) The intentions of the

[112] Alain Pellet, 'Canons of Interpretation under the Vienna Convention' in Klingler, Parkhomenko & Salonidis (eds) *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018) 6

[113] Yearbook of the International Law Commission, 1966 vol. II 218

[114] In fact, the agreed upon text and approach of the VCLT was also challenged, e.g. the US delegation challenged the hierarchy of articles 31 and 32, and suggested a more contextual, rather than textual, approach to treaty interpretation. See A/CONF.39/11/Add.2 149

[115]G.G. Fitzmaurice, 'Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 Brit YB Int'l L 1; Morse (1960) 39

> parties as a subjective element distinct from the text; and (c) The declared or apparent objects and purposes of the treaty."[116]

The above segment is a solid explanation of the various schools of interpretation: The textualist school, as the name hints, confines itself to the actual text of the treaty, and is the one most embraced by the ILC in the drafting of the Vienna Convention, and by the ICJ in its practice.[117] The starting premise of the textual school is difficult to argue with: Any interpretation exercise should begin with the actual text[118], and if the text is sufficiently clear, also end there.[119] However, this is rarely the situation, as formulated by Wheaton:

> "Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning."[120]

Thus, the textual approach alone is rarely sufficient. This is also acknowledged in the Vienna Convention, which calls for interpretation in the proper context and in the light of the treaty's object and purpose.[121] This formulation steers towards the teleological school[122] of interpretation, an approach in which the object and purpose of the treaty are given more interpretative value. In the teleological approach, the object and purpose of a treaty must be found within the treaty itself, or in other words, the treaty is interpreted primarily with reference to itself.[123] Particular support for the teleological approach can be found in the Draft Convention on the Law of Treaties Article 19, which reads as follows:

> "A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying

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[116] Yearbook of the International Law Commission, 1966 vol. II 218
[117] Yearbook of the International Law Commission, 1966 vol. II 220-221
[118] As expressed in various documents and by various authors, e.g. Harvard Research in International Law, *Law of Treaties* in Supplement to the American Journal of International Law Vol. 29, (1935) 947; G.G. Fitzmaurice (1951) 7; McNair (1961) 365; VCLT Art 31(1).
[119] This was already established by Vattel, who formulated it in the following way: "It is not permissible to interpret what has no need of interpretation." See Harvard Research, (1935) 940.
[120] Henry Wheaton, *Elements of International Law* (8th Edition, 1866 Carey, Lea and Blanchard) 365
[121] VCLT Art 31(1)
[122] The teleological approach can be seen as the application of *ut res magis valeat quam pereat*, the rule of effectiveness, which essentially means that a treaty should be interpreted in a way that does not deprive it of meaning. See G.G. Fitzmaurice, (1951) 8
[123] G.G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 Brit YB Int'l L 209

> the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve."[124]

The above segment clearly takes a very different approach to treaty interpretation than the one agreed to in the VCLT. Yet it signals the significance of the teleological school of interpretation. The teleological approach is best suited for multilateral treaties and conventions.[125] It must be noted that the teleological approach, if taken too far, has the tendency to be a legislative, rather than an interpretative exercise, which can be seen either as problematic or not, depending on whether the parties wish for the tribunal to "improve" the treaty text or not.[126] McNair is among those who find this approach problematic, and formulates the argument of the party invoking teleological approach ('rule of effectiveness') as "If you do not construe the treaty in the way that I submit to you to be correct, this treaty will fail in its object" and adds that "many treaties fail – and rightly fail – in their object by reason of the words used, and tribunals are properly reluctant to step in and modify or supplement the language of the treaty."[127] This is due to McNair's take on interpretation, which

> "[C]an be described as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*"[128]

The formulation used by McNair clearly places less significance on the object of the treaty, and more on the intent of the parties, which brings us to the last major school of interpretation. The intent of the parties school shares the same premise as the teleological school, namely that context must be added to the text itself. However, instead of looking into the treaty itself, the intent school places greater interpretative value into the background, surrounding circumstances and the preparatory works of the treaty[129] - according to the school, the only legitimate object is to give effect to the intentions of the parties.[130] If it can be established that all the parties to the treaty have a same intention regarding the treaty, it is evident that their intention should be given effect, even if it is contrary to the words used in

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[124] Draft Convention on the Law of Treaties Article 19, See Harvard Research (1935) 937
[125] G.G. Fitzmaurice (1951) 2; Morse (1960) 41
[126] G.G. Fitzmaurice (1957) 207-208
[127] McNair (1961) 383
[128] Ibid 365, emphasis added
[129] Morse (1960) 39-40
[130] G.G. Fitzmaurice (1951) 1

the text. However, it is questionable, especially with multilateral treaties such as the ECT, whether a common and comprehensive intention shared by all parties can ever be deciphered. Fitzmaurice formulated this problem in the following way:

> "There is, however, now a school of thought which … does query whether the continued relevance of intention is anything much more than a pious fiction in the general multilateral field. The haste and confusion in which multilateral conventions are often drawn up; the mixed aims, motives, interest, and ideologies of the countries represented at the drafting conference; the fact that many of those States which took a share in the framing of the convention subsequently fail to become parties to it…"[131]

The above is an extreme take on the insignificance of the intention of the parties in the interpretation of multilateral treaties – a more moderate view would allow the intention of parties some value, if other approaches of interpretation lead to unsatisfactory results.[132] It is, however, noteworthy that the critique presented by Fitzmaurice concerning the common intentions of the parties fits the ECT well. The ECT was drafted in a quick schedule, and several countries that did not become parties to it nevertheless participated in the drafting.

Above I have discussed some of the various 'rules' and 'schools' of treaty interpretation and now, something can be said of how they are applied in this paper. It is evident that as there is no strict rule of treaty interpretation, the above discussion rather presents logical tools to aid in the task. As such, one does not have to submit oneself to any one of these approaches wholly, but instead use them to support each other in a logical and reasonable way. As I have interpreted a multilateral treaty – the ECT – I have mostly relied on the schools of textual and teleological interpretation.[133] The intent of the parties of the ECT could potentially be impossible to decipher adequately. In my interpretation process, I have first aimed to decipher the object and purpose of the ECT by investigating the texts of the treaty and its framework. Secondly, I have examined the actual words and clauses of the treaty and applied them in the light of the object and purpose. In other words, I have followed the VCLT guidelines of interpretation, while giving the teleological approach more relative weight.

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[131] Ibid 3-4
[132] Ibid; This is also reflected in the VCLT Article 32(1).
[133] However, I avoid making an argument that would rely on the claim that any application based on an interpretation different from the one presented here would "defeat the object and purpose of the ECT". Such argumentation is too absolute and fails to consider the more nuanced nature of the ECT, or any other instrument for that matter.

3. Energy Charter Treaty and the Environment

3.1. Introduction

The Energy Charter Treaty is often seen as detrimental to the protection of the environment as the Treaty itself does not explicitly treat fossil fuel -based energy in a different way than it would treat renewable energy. Furthermore, the arbitrators have not had many possibilities to discuss the environmental aspects of the Treaty. There have been only a few public cases, where arbitrators have, in their award, explicitly relied on or stated that either of the parties relied on the environmental aspects of the Treaty.[134] Over this chapter, I show that such a situation is unwarranted;[135] The environmental provisions of the ECT can and should have more significance in any situation where the Treaty is either interpreted or applied. I have applied the aforementioned schools of interpretation, in conjunction with the Vienna Convention rules of interpretation, to support this claim. Particular weight was given to the teleological and textual schools of interpretation. The case could also be made through other interpretative approaches, e.g. the approach of restrictive interpretation. However, the significance of this approach has been lesser since the adoption of the VCLT.[136]

3.2. Object and Purpose of the ECT

3.2.1. The European Energy Charter

The Charter itself is a non-binding political declaration. The Energy Charter Treaty, however, ought to be interpreted through the lens of the Charter[137] as stated in ECT Article 2, titled as the Purpose of the Treaty:

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[134] E.g. *Blusun S.A., Jean Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3 (see Section 3.4 below); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Award (12 March 2019) [408]; and *Stadtwerke München GmbH, AS 3 Beteiligungs GmbH; Andasol 3 Kraftwerks GmbH; Andasol Fonds GmbH & Co. KG; Ferranda GmbH; Ferrostaal Industrial Projects GmbH; RWE Innogy GmbH; RheinEnergie AG;Marquesado Solar S.L. v. Spain*, ICSID Case No. ARB/15/1, Award (2 December 2019) [53]

[135] However, the relatively little attention that the environmental aspects have gotten may have more to do with the hesitation of parties to emphasize environmental obligations – reliance on environmental aspects of the ECT would entail that the actor truly meets its environmental obligations broadly, and not just in the particular case.

[136] Restrictive interpretation is an approach to interpretation, according to which treaties are to be interpreted with the assumption that states have intended to retain as wide sovereign rights as possible within the treaty context. The VCLT, however, makes no references to this approach.

[137] As Klabbers has stated regarding deciphering the object and purpose of complex treaty frameworks, much depends on the actual terms. In ECT context, the terms used seem to support the inclusion of the Charter in the interpretative process. See Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) The Finnish Yearbook of International Law VIII 138, 153-155

> "This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on the complementarities and mutual benefits, and *in accordance with the objectives and principles of the Charter*."[138]

Thus, it seems that the Charter offers the interpretative key to finding out the object and purpose of the Treaty, which forms one of the key components of treaty interpretation.[139] The Charter has particular significance in the teleological approach, but also in the textual approach, as the Treaty makes a direct reference to it. The Charter sets out the objectives of the Treaty, namely creating a favourable climate to the operation of enterprises and flow of investments, while maximising the efficiency of production and use of energy, and minimising environmental problems on an acceptable economic basis.[140] The Charter, although placing importance on all objectives, does seem to pay particular attention to environmental matters. Already in the Preamble, the Charter places the importance of energy efficiency and protection of the environment on a higher level than the importance of trade and investment -related aspects. The difference in importance is noticeable when comparing the preambular paragraphs with each other.

On sustainable development, energy efficiency and the protection of the environment, the Preamble states:

> "Convinced of the *essential* importance of efficient energy systems in the production, conversion, transport, distribution and use of energy for security of supply and for the protection of the environment" and;
>
> "Willing to do more to attain the objectives of security of supply and efficient management and use of resources, and to utilise fully the potential for environmental improvement, in moving towards sustainable development"

Whereas on trade and investment, the Preamble uses considerably weaker language:

> "Determined to establish closer, mutually beneficial commercial relations and promote energy investments" and;

[138] ECT Article 2, emphasis added
[139] VCLT Article 31
[140] Charter, Title 1: Objectives

> "Convinced of the importance of promoting free movement of energy products and of developing an efficient international energy infrastructure in order to facilitate the development of market-based trade in energy".[141]

This formulation of the importance of interests alone – whether it is essential or not – casts doubt on the typical characterisation of the object and purpose of the ECT as to being solely economical.[142] The Charter also lists several examples as to how these principles and objectives are to be reached under Title I: Objectives:

> "Energy efficiency and environmental protection, which will imply:
>
> - creating mechanisms and conditions for using energy as economically and efficiently as possible, including, as appropriate, regulatory and market-based instruments;
> - promotion of an energy mix designed to minimise negative environmental consequences in a cost-effective way through:
>   (i) market-oriented energy prices which more fully reflect environmental costs and benefits;
>   (ii) efficient and coordinated policy measures related to energy; and
>   (iii) use of new and renewable energies and clean technologies."[143]

These implied actions offer valuable insight regarding the interpretation of the Treaty itself. The Treaty is to be applied in accordance with the principles and objectives of the Charter, and the Charter has laid out several key measures that would promote the fulfilment of its environmental objectives. The ones which are of the most practical importance, and can be

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[141] Charter, Preamble, emphasis added

[142] E.g. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) [165-167], where the tribunal found the object and purpose to be a balance between protection of foreign investments and the promotion of the economic development of the Contracting Parties. Despite stating that taking into account the totality of the Treaty's purpose is appropriate, the tribunal remains silent on the environmental aspects.

Khan Resources Inc., Khan Resources B.V., CAUC Holding Company Ltd. V. The Government of Mongolia, MonAtm LLC, PCA Case No. 2011-09, Decision on Jurisdiction (25 July 2012) [426-427], where the tribunal found the object and purpose of the ECT to be the creation of a predictable legal framework for investment in the energy field.

In *NextEra v. Spain*, the respondent goes as far as to explicitly argue that the protection of the environment is of minor importance and outside the scope of the object and purpose of the ECT. Although the tribunal does not explicitly state their own finding as regards the object and purpose of the ECT, they nevertheless ruled against the respondent. See *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Award (12 March 2019) [408]

[143] Charter, 1.3.

derived from the section above, are 1) explicit allowance of regulatory instruments for environmental protection[144]; 2) market-orientated approach should fully reflect the environmental costs and benefits; and 3) an explicitly stated preference for renewable energy sources.

As the Energy Charter Treaty has made an explicit reference to the objectives and principles of the European Energy Charter, it seems clear, that the contents of the Charter should be utilised when deducing the object and purpose of the Treaty. Above, I have presented the Charter's key sections regarding the environment, which establish that environmental aspects ought to be considered whenever applying the Treaty. Below, I have discussed the provisions of the Treaty itself.

3.2.2. Significance of Preambles

The preambles to treaties have an important role in treaty interpretation[145], and in particular aid in deciphering the object and purpose of a treaty.[146] The preambles of various treaties have in fact been used as interpretative aids by several bodies, including the ICJ[147] and, perhaps in a more relevant way, the Appellate Body of the WTO, which in its landmark *US-Shrimp* case held that:

> "[T]he preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, *fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy* […] As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it *must add colour, texture and shading to our interpretation of the agreement* annexed to the WTO Agreement, in this case, the GATT 1994."[148]

[144] The ECT itself does not explicitly say that states would have a "right to regulate". However, several abovementioned arbitration cases have stated that states retain their right to regulate and, furthermore, several parties to the ECT, e.g. EU and its member states, wish to alter the Treaty so that it would explicitly contain the right to regulate. See Energy Charter Secretariat, CCDEC 2019 08 STR, Brussels, 6 October 2019, 2, 14-15.
[145] This is codified in VCLT Art. 31(2)
[146] ICJ, *The Reservations to the Convention on Genocide, Advisory Opinion: I.C.J Reports 1951*, 23-24; Klabbers (1997) 156
[147] E.g. ICJ, *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)* (Judgment) (28 November 1958) 67, in which the ICJ stated that 'The 1902 Convention, as indicated by its preamble, was designed to "lay down common provisions to govern the guardianship of infants"'.
[148] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [130, 153], emphasis added.

The Appellate Body's finding above is based on a section of a preambular paragraph, which states that:

> "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's *resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment* and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development"[149]

It is noteworthy, that the paragraph in question is the only one in the WTO Agreement referring to the environment, and it also aims to strike a balance between the trade aspects, as is evident from the first half of the paragraph. Nevertheless, the WTO Appellate Body found that this single reference established an awareness on the importance of environmental protection and that it reflects the intentions of the negotiators. In contrast, the Preamble to the Energy Charter Treaty, which is discussed below, seems to consider the environmental aspects considerably more, as it has several paragraphs dedicated solely to environmental aspects.

3.2.3. The Preamble to the Energy Charter Treaty

The Preamble to the ECT contains 15 paragraphs, which cover a wide range of goals and ideals of the parties to the Treaty.[150] The first five preambular paragraphs effectively recall earlier political declarations, with paragraph 1 referring to the Charter of Paris for a New Europe and paragraphs 2-5 to the European Energy Charter, further emphasizing the Charter's significance as an interpretative aid. The next few paragraphs list out the principles

[149] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M 114 (1994), Preamble, emphasis added.

[150] It could be argued that such a wide Preamble highlights a weakness of the so-called treaty interpretation rules, as support for almost any position could be found from a treaty text, possibly, and often, leading to a situation where prominent treaty interpreters reach the opposite conclusions, which begs the question of whether the rules are actually functioning. More on this e.g. Jan Klabbers, 'Virtuous Interpretation' in M. Fitzmaurice, O. Elias & P. Merkouris (eds) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010 Brill Nijhoff) 33
This apparent weakness of the VCLT rules, however, is not of issue at this time. In this section, I am still arguing that the ECT *can* be interpreted in a greener way in contrast to the currently dominating interpretative focus on the investment aspects of the Treaty.

related to the WTO, trade and, the treatment of investors. In particular, the language of the paragraph concerning the treatment of investors is quite strong:

> "Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment…"[151]

The above paragraph, if considered alone, could lead to the impression that the ECT is mostly concerned with the treatment of investors, which, frankly, has been the case in several arbitration proceedings under the ECT. However, it is striking that the Preamble contains several paragraphs that exclusively concern environmental matters [152], of which three are of particular importance.

Firstly, the preambular paragraph 12 reads in the following way:

> "Recognising the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy."

The language of the above paragraph is significant for several reasons. Energy efficiency is a key element in the protection of the environment in the ECT context and closely related to the concept of sustainable development.[153] Using the language of necessity to describe its importance speaks volumes on the significance of the matter.[154] Further, the paragraph utilises the term *most effective*. As the most effective method for various actions, e.g. the production or use of energy, changes constantly, it is arguable, that the use of such language suggests that the parties intended for the treaty to have an evolving meaning. The ICJ has confirmed the possibility of evolutionary interpretation of treaties in the *Case concerning the River San Juan*, where the Court stated:

> "…[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing

[151] ECT, Preambular paragraph 6
[152] Clare Shine lists the preambular paragraphs 12-15 as exclusively concerning environmental matters. Clare Shine, 'Environmental Protection Under the Energy Charter Treaty' in T.W. Wälde (ed) (1996) 521
[153] Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA), Preamble & Article 1
[154] When discussing state responsibility, which of course is a different context, the state of necessity has a very high threshold, which, if met, allows for a state to digress from its international obligations.

> duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."[155]

The ECT is of continuing duration, which allows for an evolutionary interpretation of some of its aspects – arguably even more so regarding its environmental aspects, as the field of international environmental law is among the most rapidly evolving fields of law.[156]

Secondly, in preambular paragraph 13, it is stated that:

> "Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects."

This paragraph reflects the VCLT Article 31(3)(c) by referring to other relevant rules of international law, and the significance of it is that it broadens the range of interpretative aids by referring to international environmental agreements. It is clear that no claim can be made under the auspices of the ECT for a breach of e.g. the United Nations Framework Convention on Climate Change, but such instruments can nevertheless be utilised in the interpretation of ECT disputes.[157] According to Shine, it evokes the two most notable forms of environmental threats arising from generating energy from fossil fuels, although the paragraph does not say so explicitly, namely global warming[158] and acidification.[159]

Thus, based on the wording of the paragraph, it seems that the negotiators of the ECT have considered international environmental agreements to fall within the scope of relevant rules of international law, which further strengthens the argument that environmental matters cannot be ignored while interpreting or applying the Treaty.

Lastly, in the final preambular paragraph it is stated that:

> "Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes."

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[155] ICJ, *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, (Judgment) (13 July 2009) [66–67]
[156] Sands et al (2018) 50-51
[157] However, a widespread application of international environmental conventions as interpretative aids falls outside the scope of this paper.
[158] Although Climate Change would be a more contemporary term.
[159] Clare Shine (1996) 521

The language of the paragraph is plain and strong – an "increasingly urgent need for measures to protect the environment" does not leave much room for ambiguity on whether the protection of the environment is a legitimate goal of national or international policy, in particular when compared with the language and application of the WTO Agreement discussed above. Secondly, the paragraph states that the measures to protect the environment may include the decommissioning of energy installations. Such language offers support for even the strictest measures to protect the environment, up to, and including, the closures of functioning installations. However, whereas this section offers support for the legitimacy of such actions, it does not offer states a waterproof defence against expropriation claims, which would quite likely follow a national measure to decommission an energy installation[160], as it is not significant whether expropriation was done for laudable goals or not. The language used rather lowers the threshold of a public interest required for lawful expropriation under article 13 and offers support to states responding to Article 10 claims. The last part of the paragraph is somewhat unfortunate from the environmental point of view - it seems to be softening the already soft environmental obligations by placing the burden of creating such objectives and criteria to the international level rather than national. Such formulation would seemingly allow for states to postpone action until there are such internationally agreed factors in place and, on the other hand, for investors to argue against national measures that are stricter than those agreed internationally. This, however, seems unlikely. Despite the language at the very end, the paragraph as a whole still takes a powerful stance in favour of stricter measures for the protection of the environment, while coming short of actually obligating states to any specific conduct.

3.2.4. Summary

Above I have discussed the sections of the Energy Charter Treaty that would offer the most insight regarding the object and purpose of the treaty, namely the Preamble and the Charter, as explicitly allowed by Article 2 of the Treaty. I have focused on the environmental aspects of the Charter and Preamble – both contain matters relating to trade and investment as well. That is to say, the sole object and purpose of the Energy Charter Treaty is by no means the protection of the environment. However, as can be seen from the extensive references

[160] E.g. *Vattenfall v. Germany (I)* & *Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co. oHG, Kernkraftwerk Brunsbüttel GmbH & Co. oHG v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 ("Vattenfall v. Germany (II)") both concern measures less strict than decommission, and yet in both cases arbitration proceedings were initiated.

relating to the protection of the environment in the ECT framework, it is evident that it nevertheless forms a prominent part of the object and purpose.

The arbitration tribunals, and the parties to the dispute as well, applying the ECT often tend to simplify the object and purpose to solely consider the investment aspects of the Treaty, as discussed above. This is arguably a misinterpretation of the Treaty, as it would effectively make large parts of the ECT framework meaningless.[161] Thus, the object and purpose of the Energy Charter Treaty should be understood to be the promotion of long-term cooperation in the energy field, based on *both* the promotion and protection of investments *and* the protection of the environment.[162] This formulation of the object and purpose of the ECT also has some support in arbitration practice. In *Eiser Infrastucture Limited and Energia Solar Luxembourg S.À.R.I. v. Kingdom of Spain* ("*Eiser v. Spain*"), the tribunal, while setting the factual background, couples the purpose of the ECT with Article 19 provisions addressing the environmental aspects of energy development[163] although more often the tribunals fail to consider the environmental aspects of the Treaty.

3.3. Environmental Aspects of the Energy Charter Treaty

3.3.1. Introduction

Having established that the object and purpose of the ECT includes environmental matters as well those relating to investments, I now turn my attention to the operative parts of the Treaty focusing on the environment, namely Articles 18, 19 and the Protocol on Energy Efficiency and Related Environmental Aspects ("PEEREA"). In this chapter, I have discussed what the parties to the Treaty actually have the right to, or are obliged to, do regarding the environment. In this section, I have mostly relied on a textual interpretation of the Treaty, or,

[161] This would be problematic keeping in mind the maxim *ut res magis valeat quam pereat*, the rule of effectiveness. Although it is questionable whether this constitutes an actual rule (McNair (1961) 383), it seems plausible as treaties are to be interpreted as a whole (Fitzmaurice (1951) 9). Thus, an interpretation that would leave certain aspects of the treaty meaningless does not seem likely.

[162] Klabbers has argued that a treaty's object and purpose is a difficult test to apply, and one that is so flexible that it may be used to support completely opposing views. See Klabbers (1997) 139, 159-160.
The critique on relying on the object and purpose of a treaty is apt, yet some parts of it could be directed to any given method of interpretation – even interpretations solely relying on the texts may be diametrically opposed. I have attempted to tackle this issue with the balanced formulation above regarding the object and purpose of the ECT that acknowledges both the commercial and environmental aspects of the ECT. The formulation does not aim to upend the established practice under the ECT, but rather to nudge such practice towards a more equitable situation, where the various aspects of the Treaty are given more equal significance.

[163] *Eiser Infrastucture Limited and Energia Solar Luxembourg S.À.R.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017) [99-100]

in other words, I have assigned the ordinary meaning to the terms used in the text in good faith, as is stipulated in the VCLT.[164]

3.3.2. Article 18: Sovereignty over Energy Resources

Article 18 of the ECT is comprised of four paragraphs concerning different aspects of sovereignty over energy resources.[165] Paragraphs 18(1) and 18(3) have significance for the environment[166] whereas paragraphs 18(2) and 18(4) are more concerned with the fairness of the trade and investment regime.

Paragraph 18(1) states that:

> "The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law."

The first sentence of the paragraph sets the standard of sovereignty over resources[167], however, everything that follows within Article 18 sets limitations to the states' sovereign powers. The second sentence of the paragraph is of significance for the environment, as it ascertains that the sovereign rights are still subject to the rules of international law. Thus, states cannot utilise, or allow the utilisation, of the resources in an unlawful way. There are no *lex specialis* rules that would, e.g. prohibit certain types of energy installations. However, there are certain *lex generalis* rules through Customary International Law that the states must adhere to, although due to their customary nature it might be difficult to show that they would have been breached. Perhaps the most important such general rule in this instance was confirmed by the ICJ in its Advisory Opinion concerning *Legality of the Threat or Use of Nuclear Weapons* in which the Court found that states have an obligation to ensure that activities within their jurisdiction and control respect the environment of other states.[168] In the ECT context this means that states may not allow the use of their territory for activities

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[164] VCLT Art 31(1).

[165] Although the term "sovereignty" is used, there are in fact several limitations to the states' powers. The Treaty acknowledges in Article 18(2) that "[T]he Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources", which could allow for states to disregard their ECT obligations. This possibility, however, was foreseen, and the representatives made a Declaration, according to which "Article 18(2) shall not be construed to allow the circumvention of the application of the other provision of the Treaty."
Final Act of the European Energy Charter Conference, Declaration V

[166] Shine (1996) 522

[167] The formulation of Article 18(1) relies on the formulation used in the GA resolution 1803 (XVII) titled 'Permanent Sovereignty over Natural Resources', adopted 14 December 1962.

[168] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion) (8 July 1996) [29]

harmful to other states. However, it is unclear what the practical consequences of this rule might be as, for example, the use of coal is still lawful, despite the fact that burning coal certainly damages the environment of other states. Furthermore, the paragraph allows for states to voluntarily accept restrictions on their sovereignty by ratifying instruments aiming at the protection of the environment.[169]

Paragraph 18(3), with added emphasis, states that:

> "Each *state continues to hold in particular the rights* to *decide the geographical areas within its Area to be made available for exploration and development of its energy resources*, the optimisation of their recovery and *the rate at which they may be depleted or otherwise exploited*, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and *to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area*, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises"

This paragraph is of particular importance, as it explicitly establishes that states continue to hold the right to regulate large parts of the energy cycle, although it falls short of explicitly allowing for regulating the exploitation of resources for environmental reasons. Despite this, states nevertheless continue to hold the right to decide the rate of exploitation, and where[170] such activities may be conducted. In essence, this means that states may unilaterally adopt stricter measures to protect the environment and natural resources, as long as such measures do not conflict with other treaty obligations of the state, such as most favoured nation -, or FET-standards.[171] Paragraph 18(4) further confirms that states shall act in a non-discriminatory manner when facilitation access to energy resources. As paragraph 18(3) is the only section in the ECT where the right to regulate is explicitly stated, it is curious that this Article has never been referred to in a public arbitrational award.[172]

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[169] Shine (1996) 523

[170] The paragraph leaves some ambiguity in this matter, as according to it states have the right decide where exploration and development of its resources can be conducted. It does not differentiate between exploration and development, which could lead to the conclusion that if exploration is allowed, then development is as well. This aspect could be of importance in the ongoing Rockhopper v. Italy arbitration, where Rockhopper has explored Italy's coast for oil, and Italy has since passed stricter environmental regulation setting limits on how close to the shore such oil installation can be placed. See: *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14

[171] Shine (1996) 524

[172] As of 27 July 2020, see ECT Secretariat's database on cases under the ECT, available at <https://www.energychartertreaty.org/cases/list-of-cases/>

At the core of Article 18 is that the states have the sovereign right to exploit their resources, and regulate any activities relating to energy, as long as the regulation complies with the ECT and apply to foreign and domestic actors equally.

3.3.3. Article 19: Environmental Aspects

Article 19 is the only article in the Energy Charter Treaty that exclusively concerns environmental matters, and although the article is quite lengthy, it is still notably small in might when compared to the weight given to environmental matters in the Preamble of the Treaty. The Article is comprised of 3 paragraphs, of which 19(1) and 19(3) are discussed under this heading, whereas Article 19(2) is discussed under Chapter 4, as it concerns dispute settlement between states. Further, Article 19(1) is best discussed divided unto separate paragraphs, as otherwise the result would be impractical. As Article 19(3) defines several key concepts of the Article 19, it is beneficial to explore certain of these definitions first, before looking into the material provisions of the Article.

Article 19(3) defines certain key terms of the Article, namely those of "Energy Cycle", "Environmental Impact", "Improving Energy Efficiency" and "Cost-Effective". The definitions of the Energy Cycle and Environmental Impact are particularly broad. Energy Cycle means the entirety of the chain, covering exploration, production and use of energy, and also the decommissioning of such activities.[173] Environmental Impact is equally broad, covering *any* effect caused by a given activity on the environment, including health, flora, fauna, soil, air, water, climate, landscape, monuments, cultural heritage and socio-economic conditions resulting from these factors.[174] Thus, the scope of Article 19 is very wide – any activity related to energy, which has an impact on the environment falls within it.

The first part of Article 19(1) lays out the primary environmental obligations of the member states:

> "In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each

[173] ECT Article 19(3)(a)
[174] ECT Article 19(3)(b)

> Contracting Party shall strive to take precautionary measures to prevent or minimise environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade."

The above contains plenty of important aspects, but it must be noted that the obligations are weak – each obligation regarding the environment is formulated so that the states shall *strive* to act in a certain way. The use of the word strive implies that these are obligations of conduct, rather than obligations of result, i.e. they do not obligate a state to reach a certain outcome, but rather to attempt reaching it.[175] Furthermore, these obligations contain extra qualifiers, namely that states shall act in a cost-effective manner when striving for the environmental goods, and must not distort international investment and trade in the energy field in the process. Essentially, the formulation of environmental obligations makes it difficult to show that a state would have breached its environmental obligations, which limits their usefulness in inter-state disputes, or when relied upon an investor against the host state, leading Shine to argue that it would be unlikely that Article 19 would have much significance in disputes.[176] So far, this has been the situation, with references to Article 19 in arbitration awards rare.[177] However, I argue that the situation is changing and that these obligations, or rights, could become increasingly useful to states responding against investor claims, as is discussed under Chapter 4. Below, I disseminate the environmental obligations of ECT parties as laid out in Article 19(1). This is done in great detail, as Article 19 contains most of the environmental aspects of the ECT and is thus of great importance for this paper.

Firstly, the paragraph invokes sustainable development, a concept which has already had considerable effect in treaty interpretation[178] or even in sidestepping certain treaty obligations.[179] The paragraph does not explicitly say that parties should either act or strive to act sustainably. However, the formulation of the paragraph – 'pursuit' – and the nature of the concept of sustainable development implies that this is an obligation of conduct, essentially stipulating that states cannot ignore environmental aspects. This obligation is further clarified

[175] Constantin P. Economides, 'Content of the Obligation: Obligations of Means and Obligations of Result' in Crawford et al (eds) *The Law of International Responsibility* (Oxford University Press 2010) 371-381
[176] Shine (1996) 537
[177] Article 19 of the ECT has only been referred in public awards at the recent Spanish solar energy cases, which will be discussed under Chapter 5.
[178] E.g. The *US-Shrimps* case discussed above.
[179] ICJ, *Gabčikovo-Nagymaros Project (Hungary/Slovakia*) (Judgment) (25 September 1997) [140]

with another obligation of conduct, namely that states shall strive to minimise harmful environmental impacts within the energy cycle. It is noteworthy that the obligation to pursue sustainable development is a continuing one – it applies to new projects as well to those that are already ongoing.[180]

These obligations do not bind a state to a specific result, e.g. shutting down coal power plants, nor can a state be easily found to be in breach of them. On the other hand, such weak obligations can be read as rights that would offer a state normative support should they wish to regulate environmental matters more strictly.[181] The first section of the paragraph again refers to other international environmental agreements; however, such agreements rarely contain explicit obligations of result that could offer an unambiguous solution to disputes under the ECT – rather they may offer more context for interpretation of the ECT itself.

Secondly, the paragraph invokes the precautionary approach, stipulating that the policies and actions of states should be aiming to minimise or prevent environmental degradation. Again, it is difficult to prove a breach of such an obligation as states are only obliged to *strive* towards acting precautionary, but it offers further justification to a state wishing to take more aggressive climate actions.

Lastly, the paragraph invokes the polluter pays -principle, which means that the person responsible for the pollution ought to bear the costs of pollution.[182] The aim of the principle is to internalise the costs of producing energy in an unsustainable way, rather than passing the costs to the taxpayers or leaving them unpaid, resulting in the degradation of the environment.[183] Were the principle fully implemented, it would reflect the true environmental costs of producing energy[184] and thus drive the production costs of the most unsustainable forms of energy higher. The paragraph, however, contains several caveats that weaken the rule. According to the Treaty, the polluter pays -principle, applies *in principle*, with regard to public interest and without distorting investments or trade. Even though the obligation is

[180] Ibid
[181] Although the formulation of Article 19 means that the provisions in question are certainly *obligations* of a state; a state may, however, utilise them as *rights* to regulate more strictly, and thus respond to Article 10 claims by relying on them.
[182] Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law* (Cambridge University Press 2012) 228-229
[183] Shine (1996) 527
[184] Which is among the objectives of the Charter, Title 1.3. Charter Title 1.3., polluter pays -principle, and the cost-effectiveness (discussed below under Section 4.2.2.) considered together could lead to interesting arguments, as states would be able to argue that the ECT framework offers clear support for measures that are adverse for the profits of producers of fossil fuel based energy.

worded quite weakly, the principle is applied in many of the state parties, in particular within the EU.[185]

Thus, the primary environmental obligations of states are to strive towards sustainable development, to strive to take precautionary measures and, in principle, to internalise the costs of energy production. Paragraph 19(1) also lists an eleven-point list of measures that states are required to comply with. However, each of the action points is formulated similarly to the primary obligations - permissively. These action points will be discussed below, individually:

> "Contracting Parties shall accordingly:
>
> (a) Take account of environmental considerations throughout the formulation and implementation of their energy policies;"

The subparagraph obligates states to "take account" of environmental considerations, but it does not clarify what this would entail.[186] The obligation relates more to conduct than to actually achieving a particular result, yet it does obligate states to formulate their energy policies, and from those formulations the state's environmental considerations should be deductible – thus a state could potentially be in breach of this obligation, if no such consideration of environmental matters is to be found in their policies.

> (b) "promote market-oriented price formation and a fuller reflection of environmental costs and benefits throughout the Energy Cycle;"

This is another weakly worded obligation, as states are only obligated to *promote* the reflection of true costs and market-oriented price formation. Although it would seem that all states would have the interest to do this – in theory, the true reflection of environmental costs would steeply increase the opportunity costs[187] of utilising unsustainable forms of energy, and thus direct rational actors towards sustainable forms of energy. Fossil fuel-based energy, however, is often cheaper than sustainable forms of energy, at least initially. Thus, many

[185] The EU utilises an emission trading system, in which e.g. companies producing energy must buy emission rights, in order to be able to pollute. See <https://ec.europa.eu/clima/policies/ets_en> accessed on 18 March 2020.
[186] Shine lists several issues that *should* be covered while taking account of the matter. Shine (1996) 528
[187] Opportunity cost is a term used in economics and refers to what the situation would be if assets had been used differently e.g. in sustainable energy instead of dirty energy. The matter is discussed further below.

states may be concerned about their own competitiveness[188] if they would allow for the price of energy to reflect the true environmental costs.[189]

(c) "having regard to Article 34(4), encourage cooperation in the attainment of the environmental objectives of the Charter and cooperation in the field of international environmental standards for the Energy Cycle, taking into account differences in adverse effects and abatement costs between Contracting Parties;"

Article 34 concerns the Energy Charter Conference, the co-operative body established by the ECT to be its deciding body. This subparagraph again only encourages cooperation, thus even falling short of actually obligating states to cooperate to some degree. Therefore, it is a very weak obligation, although, if there were a wide cooperation in the field of energy policy it would eliminate some of the fears of losing the competitive edge, and thus would allow for the true environmental costs to be better reflected. The advanced level of harmonisation achieved in the EU is a good example of this, as the EU as a bloc has managed to cut down on emissions.[190] The subparagraph also takes into account that not all states are similarly affected, or similarly able to abate the costs of environmental protection.

(d) "have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution;"

This subparagraph, although containing a generally laudable goal without any particular obligations[191], nevertheless explicitly states the preference of the parties – renewable energy over dirty energy. Although it does not obligate the parties to achieve a certain result, this stated preference can be of significance in a dispute. The PEEREA concerns matters similar to this subparagraph in greater detail.

(e) "promote the collection and sharing among Contracting Parties of information on environmentally sound and economically efficient energy policies and Cost-Effective practices and technologies;"

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[188] This issue would provide for an interesting subject to be examined through the methodology of game theory, a theme which is also briefly discussed below.
[189] Shine (1996) 530
[190] See <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1180.pdf> accessed on 18 March 2020
[191] Shine (1996) 532

The subparagraph simply encourages states to share information on their practises, yet it does not obligate to it. Again, it offers evidence of the signatories' preference towards sustainability, but this subparagraph is unlikely to have much effect in settlement of disputes.

(f) "promote public awareness of the Environmental Impacts of energy systems, of the scope for the prevention or abatement of their adverse Environmental Impacts, and of the costs associated with various prevention or abatement measures;"

The promotion of public awareness serves several purposes; consumers better informed of the environmental impacts of energy production would arguably be more likely to prefer renewable energy sources. Furthermore, informed consumers strengthen the functioning of the energy market, as more consumers would act akin to the fictional economic man.[192] This subparagraph, however, suffers from the same shortcomings as the others: It merely obligates states to promote certain type of conduct – an easily fulfilled obligation.

(g) "promote and cooperate in the research, development and application of energy efficient and environmentally sound technologies, practices and processes which will minimise harmful Environmental Impacts of all aspects of the Energy Cycle in an economically efficient manner;"

Again, an easily fulfilled obligation, as it is advantageous for every state to promote the research and development of environmentally sound solutions. The subparagraph, however, is ever so slightly stronger than most under Article 19: In addition to obligating states to promote certain type of conduct, it actually obligates them to cooperate to some degree. As the threshold of cooperation is not defined, it is unlikely that this subparagraph would have much effect on disputes.

(h) "encourage favourable conditions for the transfer and dissemination of such technologies consistent with the adequate and effective protection of Intellectual Property rights;"

As the dissemination of environmentally sound technologies, discussed under subparagraph (g), is of great importance especially for cutting the emissions of developing countries, the formulation of this subparagraph is disappointing and, as argued by Shine, provides an example of how the Treaty places investment and trade at the forefront instead of the

[192] A term similar to the "reasonable person" used in law to mean a fictional person to which behaviour would be compared to.

environment[193], because the text of the subparagraph falls short of the language of Article 4.5 of the Climate Change Convention[194], according to which developed countries are to "take all appropriate steps to … transfer environmentally sound technology…". Instead, ECT obligates for states to merely encourage favourable conditions. The disappointing implications of the formulation put aside; this subparagraph is unlikely to have much significance in a dispute.

(i) "promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of Environmental Impacts of environmentally significant energy investment projects;"

The content of this paragraph is relatively clear – states are to promote the usage of Environmental Impact Assessment ("EIA") for projects which are environmentally significant. The significance of this paragraph has been discussed in an arbitration proceeding, in which the tribunal found that it does not create a self-standing obligation for the investor to conduct such an assessment and stated that such obligation must be based on the national law of the host state.[195]

(j) "promote international awareness and information exchange on Contracting Parties' relevant environmental programmes and standards and on the implementation of those programmes and standards;"

Again, this subparagraph encourages states to communicate openly, and would have little significance in disputes. In practice, the energy policies of different states are fairly openly communicated currently.[196]

(k) "participate, upon request, and within their available resources, in the development and implementation of appropriate environmental programmes in the Contracting Parties."

States are obligated to assist each other in developing and implementing appropriate environmental programmes. The subparagraph is quite ambiguous, but it makes a reference to the available resources, thus allowing for states themselves to decide what would be the appropriate level of participation should such participation be requested.

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[193] Shine (1996) 533
[194] To which an explicit reference is made in the Preamble.
[195] *Blusun S.A., Jean Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) [275]
[196] E.g. The International Energy Agency frequently publishes analysis on the energy policies of its member countries, see <https://www.oecd-ilibrary.org/> accessed on 27 May 2020.

Above I have discussed Article 19(1) of the Treaty. All of the obligations laid out in the paragraphs are of a very soft nature, which means that it would be extremely difficult to show that a state would be in breach of any of these obligations. The paragraph is clearly written from the perspective of a state that wishes to cover its bases and avoid claims that it would have breached its environmental obligations, as it does not obligate the states to any particular result. This does not mean that the environmental clauses of Article 19 would be without significance, however.[197] It is unlikely that a case by either an investor or a state could mainly rely on Article 19(1), but the obligations laid therein may nevertheless be referred to as a support of legitimate expectations of the investor, or the legitimate interests of a state.

3.3.4. Protocol on Energy Efficiency and Related Environmental Aspects

The Protocol on Energy Efficiency and Related Environmental Aspects was negotiated, opened for signature and entered into force on 16 April 1998, simultaneously with the Treaty itself.[198] The Energy Charter Treaty framework has underlined the importance of energy efficiency and environmental protection since the Charter, and the PEEREA builds on this subject. The PEEREA is legally binding part of the ECT framework for those countries that have ratified it.[199] Thus far, the PEEREA is the only protocol to the Treaty.

The PEEREA contains mostly similar soft obligations – formulated as *shall strive* – as Article 19 of the Treaty does, and its main function seems to be establishing a forum for contracting parties to cooperate on matters related to energy efficiency.[200] Nevertheless, the PEEREA also lays out some more specific obligations and acts as further evidence of the intent of the negotiators to consider environmental matters as well, through its explicit promotion of sustainable development and the full-cost principle.[201]

In addition to its soft obligation provisions, the PEEREA includes three obligations of result in Articles 3(2), 5, and 8(1), which, respectively, state that:

> "Contracting Parties shall establish energy efficiency policies and appropriate legal and regulatory frameworks which promote, inter alia: (a) efficient functioning of market

[197] See *supra* note 10.
[198] Energy Charter Secretariat, *The Energy Charter Treaty: A Reader's Guide* (Energy Charter Secretariat 2002) 44
[199] Of the ECT parties, only Australia, Belarus, Iceland and Norway have not ratified the PEEREA, although Belarus applies it provisionally. See https://www.energycharter.org/process/energy-charter-treaty-1994/energy-efficiency-protocol/ accessed 19 March 2020
[200] Energy Charter Secretariat (2002) 44
[201] PEEREA, Art 1(2)

mechanisms including market-oriented price formation and a fuller reflection of environmental costs and benefits; (b) reduction of barriers to energy efficiency, thus stimulating investments; (c) mechanisms for financing energy efficiency initiatives; (d) education and awareness; (e) dissemination and transfer of technologies; (f) transparency of legal and regulatory frameworks. [202]";

"Contracting Parties shall formulate strategies and policy aims for Improving Energy Efficiency and thereby reducing Environmental Impacts of the Energy Cycle as appropriate in relation to their own specific energy conditions. These strategies and policy aims shall be transparent to all interested parties.[203]"; and

"In order to achieve the policy aims formulated according to Article 5, each Contracting Party shall develop, implement and regularly update energy efficiency programmes best suited to its circumstances.[204]"

As is evident from above, the Contracting Parties to PEEREA are obligated to establish and formulate policies and strategies for the improvement of energy efficiency in order to reduce the negative environmental impacts of energy. The PEEREA does not state what these policies and strategies ought to include, besides stating in paragraph 3(4) that "Energy efficiency policies shall include both short-term measures for the adjustment of previous practices and long-term measures to improve energy efficiency throughout the Energy Cycle". With such loosely worded obligations, it would in practice not be difficult for a state to fulfil these by having some policies in place,[205] however, the more thorough such policies and strategies are, the better a state's position is to defend their actions to protect the environment, as it could argue that an investor should have been aware of such policies. Despite the somewhat soft wording of these sections, the Contracting Parties of the PEEREA are nevertheless obligated to have policies and strategies for improving energy efficiency, which in practice would mean that there must be some plan to reduce dependency on energy sources based on fossil fuels.

It is noteworthy, that the PEEREA, despite its title, preamble and stated objectives, devotes relatively few lines for discussion of environmental reasons to improve energy efficiency.

[202] PEEREA, Art 3(2)
[203] PEEREA, Art 5
[204] PEEREA, Art 8(1)
[205] Shine (1996) 540

Instead, the PEEREA focuses on the trade and economic benefits of energy efficiency.[206] However, as the Protocol so clearly invokes sustainable development as its objective, this apparent focus on economic benefits should not be interpreted in a way that would place secondary importance to environmental matters. Instead, with the nature of the PEEREA kept in mind[207], it should be understood as a way to incentivise energy efficiency through arguing that it is also beneficial to the state itself, and not just to the global community.

The significance the PEEREA might receive in disputes is limited, as it does not contain many binding obligations. However, depending on the quality of fulfilment of these obligations, the position of an investor as the claimant, or state as the respondent may be stronger.[208] Furthermore, the PEEREA further emphasises the intent of the negotiators to emphasise the significance of environmental matters, which ought to be considered when applying the ECT in a dispute.

Under the following heading, I have discussed one of the few ECT cases, which explicitly concerns Article 19 obligations, and their significance.

3.4. Analysis of Blusun v. Italy arbitration

Blusun S.A., Jean Pierre Lecorcier and Michael Stein v. Italian Republic ("*Blusun v. Italy*")[209] concerned a dispute stemming from the Italian reform in the solar energy sector. The investors argued that the reform breached their rights under the ECT, namely the FET standard under Article 10(1) and that the measures had an effect equivalent to expropriation under Article 13(1).[210] Although there have been several relatively similar solar cases under the ECT, *Blusun v. Italy* is worth investigating here, as it is a rarity among the ECT by explicitly discussing the significance of Article 19 obligations.

Article 19(1)(i), as discussed above, obligates states to promote the utilisation of EIAs. The investors, however, had not conducted an EIA for their solar based power plant, and thus, the respondent argued the ECT would not afford protection to their investment.[211] The claimants

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[206] Ibid
[207] By this, I mean the focus of the PEEREA to facilitate cooperation in the field of energy efficiency rather than setting strict rules.
[208] E.g. if a state has clearly complied with the softly worded obligations of the PEEREA, it might argue that as evidence of good faith; or if a state has very vague policies for achieving energy efficiency, an investor could more plausibly claim that their legitimate expectations have been breached.
[209] *Blusun S.A., Jean Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3
[210] Xiaoxia Lin, 'Investors' legitimate expectations claims against Italy dismissed due to the absence of specific commitments' (IISD 27 June 2019), accessed at www.iisd.org on 28 May 2020.
[211] *Blusun v. Italy* [274]

argued that the tribunal would not have jurisdiction over alleged breaches of Article 19, because it does not fall under Part III of the ECT.[212] The tribunal found that

> "it is at least arguable that a tribunal constituted under Part III of the ECT could take into account conduct clearly in breach of other provisions of the ECT insofar as it is relevant to the admissibility of a claim."[213]

The tribunal seems to confirm that Article 19 may have significance in disputes falling under Part III of the ECT. The tribunal, however, continues that

> "The key point, however, is that Article 19 operates not at the level of individual investors but at the interstate level, as is equally the case with the developing general international law of EIAs."[214]

At first, the above segment seems detrimental to the argument that Article 19 would be useful for states in ISDS proceedings. It seems to suggest that the Article would bear no relevance in the relations between the investor and the host state. Such interpretation is only partly correct and, contrary to the possible first impression, the tribunal's interpretation does not run against the argument presented in this thesis. As has been discussed above, nothing in Article 19 creates a direct obligation to the investors. This lack of direct obligations to investors is clear from the last sentence of Article 19(1) "Contracting Parties shall", which confirms the tribunal's analysis that these are obligations for the state, not the investor. Article 19 therefore cannot be used in such a way as the respondent tried in *Blusun v. Italy*. However, were the state measures for the protection of the environment, rather than cutting costs, nothing in the *Blusun v. Italy* award, or the Treaty, would prevent a state from arguing that Article 19 supports its measures – argument which is returned to in Chapter 4.

The tribunal rejected Italy's claim that the investment would not be protected under the ECT, as there was no law in place in Italy that would have required the investors to conduct an EIA for their project.[215] Nevertheless, the tribunal ultimately ruled for Italy as it did not find either a breach of FET standard or expropriation. To summarise, the *Blusun v. Italy* showed that a state could not proactively invoke the Article 19 obligations,[216] as it applies on an interstate level. However, states may use Article 19 reactively to defend their own position.

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[212] Ibid [155, 275]
[213] Ibid.
[214] Ibid.
[215] Ibid [276]
[216] I.e. by forcing the claimant to defend their position on Article 19 matters.

3.5. The International Energy Charter

The International Energy Charter is a political declaration signed in 2015.[217] Although it does not contain any legally binding obligations, the International Energy Charter may still have some interpretative value regarding the intentions of the ECT parties, as it is clearly related to the Treaty itself and is accepted by the signatories as such.[218] The VCLT states that such related instruments add to the context of the treaty to be interpreted.[219]

Mainly, the International Energy Charter simply restates the political declarations contained within the European Energy Charter, which is not without significance in itself, as it also reaffirms the will of the parties to protect the environment, at times emphasising the relevance of environmental protection even further[220] in order to adapt to new challenges.[221]

It is nevertheless unlikely that the International Energy Charter would gain much significance in an interpretation of the ECT, as the instrument explicitly states that it is merely a declaration of political intention[222], and as the ECT does not contain a direct referral to the instrument.[223]

3.6. Summary

In this chapter, I have discussed the environmental aspects of the Energy Charter Treaty framework. It seems clear that there are indeed very few strictly binding environmental obligations for the parties. However, the sheer volume of references to matters such as sustainable development and the protection of the environment, and remembering the fact that treaties are to be interpreted as a whole,[224] leads to the conclusion that environmental aspects ought to be considered more often when interpreting or applying the ECT.

The ECT contains several best practice recommendations for states for the protection of the environment, and the fact that most of the environmental obligations are of rather soft law

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[217] See <https://www.energycharter.org/process/international-energy-charter-2015/overview/> accessed 24 March 2020.
[218] The International Energy Charter is published as a related document to the ECT by the Secretariat, see *The International Energy Charter Consolidated Energy Charter Treaty with Related Documents* (2016)
[219] VCLT Art 31(2)(b)
[220] In Title I: Objectives of the International Energy Charter, the very first sentence concerns the pursuit of sustainable development.
[221] Urban Rusnák, 'Foreword' in *The International Energy Charter Consolidated Energy Charter Treaty with Related Documents* (Energy Charter Secretariat 15 January 2016)
[222] International Energy Charter, Preamble
[223] Unlike how the ECT refers directly to the Charter.
[224] E.g. McNair (1961) 381

nature is not as limiting in practice as has been argued in the past.[225] When the ECT was negotiated and ratified, it must have seemed likely that states would not wish to take on these best practices due to their higher costs. However, the knowledge concerning the environment has been greatly clarified since, and it is becoming an increasingly plausible scenario that a state would wish to regulate the use of dirty energy in a way that is more costly in the short term, but beneficial to the environment.[226] As discussed, the ECT sets out many recommendations and general obligations of minimising environmental harm. Therefore, it seems increasingly likely that a state that has passed stricter environmental regulations could successfully defend such actions in investor-state dispute settlement proceedings relying on the environmental aspects of the Treaty. However, there is no such public case known.

Above I have identified the environmental obligations and recommendations contained within the ECT. In the next Chapter, I discuss how these findings might have practical effect on dispute settlement or in state practice.

[225] E.g. Shine (1996) 537
[226] E.g. *Vattenfall v. Germany (I)*, which was settled before arbitration

4. Applying the Novel Interpretation of the ECT

4.1. Introduction

Having discussed the environmental aspects of the Energy Charter Treaty framework, I now add some practical considerations to what has already been discussed. Firstly, I briefly discuss how states might apply, or have applied, the environmental recommendations of the ECT. In this instance, I also discuss economic aspects of the matter, as many of the environmental obligations include the caveat of having to be cost-effective, as seen above. Secondly, as the ECT is a highly litigated instrument, I identify certain ways in which the environmental aspects of the ECT may be of significance in investor-state and inter-state disputes under the ECT and how a state or an investor might argue cases which have environmental significance. Further, I apply the findings to an actual ECT dispute, where they could have resulted in a different outcome. To do this, the scope of discussion is broadened to also cover the investment protection aspects of the ECT, which were summarised under Chapter 2.

4.2. In State Conduct

4.2.1. Measures to Protect the Environment

The contracting parties to the ECT are bound by several softly worded environmental obligations[227], including those discussed above. Although states are not obligated to take any particular action to protect the environment in the field of energy, they nevertheless have the interest to do so. It is becoming increasingly clear that reliance on fossil fuels is wholly unsustainable, and thus every state would have a clear interest in reducing this reliance.

As was established above, the Energy Charter Treaty, although softly worded on environmental obligations, nevertheless urges states to take action to protect the environment and minimise damage to it. Applying this novel interpretation of the ECT in state practice would quite simply put, mean that states should actively aim to quit producing energy through fossil fuels, and increase the production of renewable energy in order to meet their energy efficiency obligations. There is no point in trying to list every measure a state could take to reach such goals. Yet, some examples of such environmental measures, which have had repercussions under the ECT regime, are passing stricter regulations for coal-based

[227] All ECT parties are also parties to a number of exclusively environmental agreements. These agreements rarely contain obligations for specific acts but cutting emissions would bring a state towards compliance with their obligations under such agreements.

power plants,[228] banning coastal oil drilling,[229] or incentivising the production of renewable energy with price guarantees.[230]

The Energy Charter Treaty contains several hurdles to such a straightforward approach. Firstly, any measures taken in order to minimise environmental damages or to achieve further energy efficiency must be economically efficient and cost-effective.[231] Secondly, and more importantly, the ECT's purpose is also to protect investments, and it is among the most litigated investment treaties in existence. Thus, if a state wishes to take regulative action to minimise environmental harm, it must also be prepared to defend its actions before an arbitration tribunal under the auspices of the ECT. Below, I have discussed these hurdles under their respective headings.

4.2.2. The Requirement of Cost Effectiveness

Whenever the ECT concerns environmental matters, it also states that measures taken to minimise damage to the environment must be cost-effective. Further, Article 10 forbids unreasonable measures towards foreign investors. Although unreasonableness is not defined in the ECT context, it is arguable that if a state can prove their measures to be cost-effective, such measures could not be wholly unreasonable. Cost-effectiveness is defined in Article 19(3)(d) as achieving a defined objective at the lowest cost or achieving the greatest benefit at a given cost. This definition allows for parties to choose whether the priority is given to environmental objectives or cost parameters.[232] Under this section, I argue that the requirement for cost-effectiveness is relatively easy to fulfil when transitioning from fossil fuels to renewable energy.

Admittedly, at the time of negotiating the Energy Charter Treaty, the result of the cost-effectiveness requirement might have been an added layer of protection for fossil fuels, as the cost of production of energy through renewable sources was high when compared to the production of energy through fossil fuels.[233] The cost of producing renewable energy has plummeted since the negotiating of the ECT, and the production costs are now at a

[228] E.g. *Vattenfall v. Germany (I)*
[229] E.g. *Rockhopper v. Italy*
[230] E.g. The various solar cases in Spain, Italy or the Czech Republic.
[231] ECT Article 19(1)
[232] Shine (1996) 526
[233] Which is understandable as the technologies required for renewable energy are newer than those required for non-renewable energy sources.

comparable, or lower, level to those of fossil fuels.[234] However, the initial setting-up costs may still be higher for renewable energy projects. Thus, it seems that even the simplest method of assessing the cost-effectiveness of producing energy, namely the cost per unit of energy, seems to support the shift to renewable sources of energy.

The use of such a simple method, however, does not find support in the text of the ECT. Instead, the ECT framework consistently states that the cost of energy[235] should more fully reflect the true environmental costs and benefits.[236] This formulation extends the concept of cost to include also considerations of *transaction costs* and *opportunity costs*. Transaction and opportunity costs are key concepts in law and economics -approach, and they, respectively, mean that in a given transaction all the costs are considered, and that the actors must also consider the alternative situation that would exist were the resources used differently. It is impossible to assess accurately the potential costs that climate change, to which fossil fuels contribute considerably, might cause.[237] It is clear, however, that if measures are not taken to combat climate change, the costs will be extreme. A single energy project will neither ascertain nor prevent catastrophic climate change, nor can a percentage of these costs be assigned to a single project. Despite such innate uncertainties in assigning the true environmental costs to a project, it is clear that when transaction and opportunity costs are considered, practically any transitioning from fossil fuels to renewable energy sources is cost-effective.

As discussed, the cost-effectiveness of measures to protect the environment is not the only aspect to be considered – the Energy Charter Treaty is significantly focused in the protection of investments, and the novel interpretation of the Treaty has been applied to the investment protection aspects of the Treaty below.

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[234] Dominic Dudley, 'Renewable Energy Costs Take Another Tumble, Making Fossil Fuels Look More Expensive Than Ever' (*Forbes*, 29 May 2019), accessed at www.forbes.com on 27 May 2020.
[235] Although measures to protect the environment, and the production of renewable energy are not exactly interchangeable as concepts go, but in the context of the ECT they ought to be understood as such: Essentially any measure to protect the environment that is relevant under the ECT framework would aim at increasing the share of renewable energy at the expense of fossil fuels. Therefore, the cost-effectiveness of measures to protect the environment must be assessed through comparing the costs of protective measures, in other words renewable energy sources, to the costs of non-renewable sources of energy.
[236] Charter Titles 1.3, 2.7; ECT Article 19(1)(b); PEEREA Preamble, Article 1(2), Article 3(2)
[237] However, this uncertainty is not damning to the argument, as the ECT acknowledges the precautionary approach in Article 19(1), meaning that scientific uncertainty cannot be a reason to withhold action.

4.3. Litigation Techniques focused on the Environmental Aspects of the ECT

4.3.1. Investor-State Dispute Settlement

4.3.1.1. Introduction

States might apply the novel interpretation of the ECT in numerous ways. The practice has shown, however, that state measures in the field of energy are often contested by the investors and litigated in arbitration proceedings. In this section I build on what has been discussed above and formulate litigation techniques that utilise the interpretation focusing on the environmental aspects of the treaty. Naturally, such techniques must be grounded on the Treaty itself, and thus I have not aimed to formulate techniques that would render parts of the Treaty meaningless.

Whitsitt and Bankes have identified four main types of disputes that arise in the energy sector, these being 1) disputes involving significant economic or political structural adjustment in the host state; 2) disputes triggered by the efforts of host states seeking to claim an enhanced share of resource rents; 3) disputes in which the host state seeks to enhance their environmental or social regulatory regimes; and 4) disputes in which host states seek to withdraw economic incentives for policy measures that were introduced to support particular policies.[238] I have focused on the third category cases – those involving states seeking to enhance their environmental protection regimes. Cases belonging to the fourth category of disputes are also of some significance in this discussion, as the numerous solar power cases under the ECT fall under said category.

Firstly, I discuss ISDS-proceedings, particularly focusing on Articles 10 and 13 and their relation to environmental measures and each other, and the applicability of Article 24 and General Agreement on Tariffs and Trade[239] ("GATT") exceptions for environmental reasons. The focus is on techniques suitable for states as a respondent, which would be used in the merit phase of cases, although it is possible that an investor would rely on the environmental aspects of the treaty[240], or that environmental aspects would have significance during the jurisdiction phase[241] of a case. It is noteworthy that Articles 10 and 13 protect the investors

[238] Elizabeth Whitsitt and Nigel Bankes, 'The Evolution of International Investment Law and Its Application to the Energy Sector' (2013) 51 Alta L Rev 207, 211
[239] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
[240] E.g. Spanish Solar Cases
[241] E.g. Yukos Cases – the question was not of environmental aspects, but of the applicability of the 'clean hands' principle. The significance of the maxim remains unclear, but the argument could be made that if the investor has breached (environmental) laws of the host state, they would lose the right for investment arbitration

only from state measures – the ECT is not an insurance policy against poor investment decisions. It is plausible that due to the falling demand of energy produced through coal and oil in a number of ECT contracting parties, such investments may well lose their value without any state interference.[242] It is possible that state measures have contributed to the loss of value, in which cases the tribunal must assess to what degree: investors should not be able to successfully claim full losses, when majority of them have been caused by poor investment decisions rather than state measures. These are, however, arguments of a factual nature, rather than legal and therefore receive minor considerations.

There are numerous challenges to overcome when formulating litigation techniques. Firstly, this exercise takes place in the abstract – they are not geared towards any particular situation, but rather operate on a more general level. Therefore, the focus has to be more on the law, rather than the facts. Secondly, there is no public arbitral award that would consider such environmental measures in the ECT context, and the actual memorials brought forward by the parties of a dispute have never been made public. Although the tribunals would not be bound by previous awards even if such existed, such awards would nevertheless offer hints regarding what type of arguments the parties have put forward, and how the arbitrators have considered them. Despite these challenges, it is possible to recognise certain key arguments that would be worthwhile for states to explore if faced with an investor claim due to their environmental measures.

4.3.1.2. Responding to Expropriation Claims

As was established in Chapter 2, states are obligated to pay in full the fair market value of the expropriated property, if expropriation has indeed taken place. Thus, the first key goal of a responding state, at the merits phase, is to successfully defend itself against expropriation claims based on Article 13 of the ECT. Various tribunals have discussed expropriation under the ECT. In the first ECT arbitral award, in *Nykomb Synergetics Tech. Holding AB v. Latvia* ("*Nykomb v. Latvia*"), the tribunal rejected Nykomb's expropriation claims stating that:

> "The tribunal finds that "regulatory takings" may under the circumstances amount to expropriation or the equivalent of an expropriation. The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession

under the ECT. In *Blusun v. Italy*, the respondent argued that the applicant would not have the necessary *locus standi* to bring forth the case due to failing to conduct an EIA and thus having unclean hands. The tribunal rejected the clean hands argument, although eventually ruled in favour of the respondent state. See [156, 272-276].

[242] This was briefly considered above, see *supra* note 2.

> taking or control over the enterprise the disputed measures entail. In the present case, there is no possession taking of [Nykomb] or its assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise apart from ordinary regulatory provisions laid down in the production license, the off-take agreement, etc."[243]

In *Nykomb v. Latvia*, the tribunal clearly put more weight on whether, and to what extent, possession or control had been transferred to the state. In contrast, in later case-law, the tribunals have emphasised the impact the contested measures have had to the value of the investment. In *AES Summit Generation Limited and AES-Tisza Erömü Kft. V. Republic of Hungary* ("*AES v. Hungary (II)*") arbitration, the tribunal set the standard for expropriation as follows:

> "It is evident many state's acts or measures can affect investments and a modification to an existing law or regulation is probably one of the most common of such acts or measures. Nevertheless, a state's act that has a negative effect on an investment cannot automatically be considered an expropriation. For an expropriation to occur, it is necessary for the investor to be deprived, in whole or in significant part, of the property in or in effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value."[244]

Although what constitutes a significant part is not defined, in the abovementioned award it is stated that the continuance of substantial revenues from investments proves that the value of the investment has not substantially diminished.[245] *AES v. Hungary (II)* already sets a high threshold for expropriation claims, yet other arbitration proceedings have set even stricter qualifications for measures equivalent to expropriation. In *National Grid P.L.C v. Argentine Republic*, the tribunal found that "the effect that the measures concerned must have [for there to be indirect expropriation]: neutralization, radical deprivation, irretrievable loss, inability to use, enjoy or dispose of the property."[246] The tribunal further adds that as the property has not been rendered 'worthless' by state action, there has been no expropriation.[247] Thus, for

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[243] *Nykomb Synergetics Tech. Holding AB v. Latvia*, SCC, Award (16 December 2003) [4.3.1]
[244] *AES Summit Generation Limited and AES-Tisza Erömü Kft. V. Republic of Hungary*, (ICSID Case No. ARB/07/22), Award (23 September 2010) [14.3.1]
The case concerned "price decrees" passed by the Hungarian government in order to rein in the profits of energy companies, the tribunal found that Hungary had not breached its substantive obligations under the ECT.
[245] Ibid [14.3.3]
[246] *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award (3 November 2008) [149]
[247] Ibid [154]

investor's claims of expropriation to succeed, they would have to meet the high threshold test of establishing that the contested state measures have rendered their investment practically worthless, or that they have lost control of said property due to the measures.[248] This same high threshold of rendering an investment worthless, or destroying its value has also been embraced in the ECT context. In *Charanne B.v., Construction Investments S.A.R.L. v. The Kingdom of Spain* ("*Charanne v. Spain*"), which is among the Spanish solar cases, the tribunal found that there could only be indirect expropriation if the contested measures destroyed the value of the investment. A simple decrease in the value of the shares cannot constitute an indirect expropriation, unless the loss of value can be considered equivalent to a deprivation of property.[249]

Some authors[250] have argued that a responding state could defend against certain expropriation claims by relying on Article 19 obligations, or on a so called *police powers doctrine*.[251] However, the strict formulation of Article 13, and its exclusion from Article 24 exceptions, means that the degree to which states could use environmental aspects of the ECT or rely on the police powers doctrine to combat expropriation claims is limited. Under the ECT, it is not significant whether the measures were taken to protect the environment: if the measures cause an investor to lose either the control or the value of their investment, compensation must be paid, as Wälde and Kolo have argued.[252]

However, the arbitral practice under the ECT has shown that tribunals very rarely find that Article 13 of the ECT would have been breached.[253] Therefore the narrow scope of respondent's ability to rely on Article 19 provisions against expropriation claims is not as

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[248] Johnson (2009) 11151

[249] *Charanne B.v., Construction Investments S.A.R.L. v. The Kingdom of Spain*, Arbitration No.: 062/2012, Final Award (21 January 2016) [464] – [467]

[250] See *supra* note 10.

[251] Police powers doctrine is an assertion that state measures, if taken in good faith and for legitimate purposes, cannot constitute expropriation and it has been argued that measures to protect the environment would fall under such doctrine. See Amandine van den Berghe, 'Legal opinion on Uniper's legally misconceived ISDS threat to Dutch coal phase-out' (*ClientEarth* 21 November 2019) accessed at https://www.documents.clientearth.org/wp-content/uploads/library/2019-11-26-clientearth-legal-opinion-isds-threat-uniper-ce-en.pdf on 14 July 2020.

Although I agree with many of van den Berghe's findings and conclusions, I disagree with the reliance on the police powers doctrine, as said doctrine does not find support within the provisions of the ECT, and the same result could be achieved by relying on the tests that have been established in arbitral practice discussed above, and as van den Berghe has also argued in the same opinion.

[252] Wälde & Kolo (2001) 846

[253] According to the database kept by the ECT Secretariat, the arbitration tribunals have found Article 13 to have been breached in five cases, most of which are related to the Yukos arbitration.

problematic as it might seem. The scope of the environmental defence is, however, much wider against alleged breaches of ECT Article 10, as discussed below.

4.3.1.3. Responding to Alleged Breaches of Article 10

The very first paragraph of the UNCTAD report on FET standard states that "FET has emerged as the most relied upon and successful basis for IIA (International Investment Agreement) claims by investors."[254] Investors often rely on FET claims in conjunction with expropriation claims, and tribunals have often ruled in favour of the investors in such cases.[255] Whereas Article 13 rigidly sets a high threshold for claimants, and an equally strict payment obligation for states should the threshold be met, Article 10 provisions are much more malleable, in particular due to the unqualified formulation of the FET standard found in the ECT. Thus, a responding state must be prepared to argue against Article 10 claims, FET in particular, as well.[256] The respondent's defence would need to begin by challenging the investors' claims regarding a breach of Article 10 obligations, which is covered under the current heading. Should this prove unsuccessful, the respondent may still rely upon the allowed exceptions to Article 10, which is discussed below. In any event, the respondent may rely on international law of a more general nature, such as the Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA")[257], which is recognised widely as customary international law. However, arguments based on such sources of international law are beyond the scope of this presentation.

As the formulation of Article 10 allows for practically any situation to possibly fall under its scope, some limitations must be made in this regard. The focus is on alleged breaches regarding 1) fair and equitable treatment standard, and 2) alleged unreasonable or discriminatory measures. These have been chosen, as they are among the most often invoked provisions in investor-state disputes.

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[254] UNCTAD (2012) 1

[255] Johnson (2009) 11153

[256] ECT Art 10, as discussed under Chapter 2, contains several other clauses beside the FET standard. However, it seems less likely that a respondent could successfully rely on environmental grounds against e.g. alleged breaches of the MFN standard. In any event, the inter-linkages of Article 10 obligations mean that the clauses should be seen as supporting each other. Thus, a situation that would possibly fall under another Article 10(1) clause, can nevertheless be brought up under FET standard.

[257] ARSIWA Arts 20-26 concern circumstances precluding wrongfulness. Due to the strict criteria of the applicability of these articles, it seems unlikely that a defence relying on ARSIWA in ECT context would be successful.

Tribunals have widely accepted that the FET standard protects the legitimate expectations of the investor and a related concept of legal stability.[258] This means that if legitimate expectations have been created, they need to be protected and that the legal framework in which the investment was made must remain relatively stable. The more precise nature of these concepts has been discussed by various tribunals, although in the ECT context often in cases, where the state is in fact cutting back on environmental-friendly policies. This may lead to a problematic situation for progressive tribunals – whether to place weight on the sovereign right to regulate or aim to disincentivise states from cutting back on environmentally friendly policies.[259]

In *Blusun v. Italy*, the tribunal relied on several previous arbitrations on its stance regarding legitimate expectations of the investors, directly quoting *Charanne v. Spain*, *El Paso v. Argentina* and *Philip Morris v. Uruguay*[260] tribunals.[261] In *Charanne v. Spain* the tribunal stated that:

> "under international law … in the absence of specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest."[262]

El Paso v. Argentina tribunal found similarly that:

> "Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze."[263]

Thus, it is clear that general legislation of a state is not equivalent to a specific promise made to an investor. Therefore, an investor cannot legitimately expect for the legislation of any given moment to remain unchanged. This rule would also apply to cases, where the dispute

[258] Whitsitt & Bankes (2013) 223
[259] Areta Jez, 'Environmental Policy-Making and Tribunal Decision-Making: Assessing the Scope of Regulatory Power in International Investment Arbitration' (2019) 40 U Pa J Int'l L 989 1004, 1007
[260] See *supra* note 55 for the quoted section of the award.
[261] *Blusun v. Italy* [367] – [369]
[262] *Charanne v. Spain* [510]
[263] *El Paso v. Argentina* [372]

concerned state measures aimed at the protection of the environment. *Blusun v. Italy* tribunal also added its own considerations to the quoted sections of previous cases:

> "International law does not make binding that which was not binding in the first place, nor render perpetual what was temporary only. *In the present case, the expectations are even less powerful because European law had already lowered them*: it was clear that the incentives offered were subject to modification in light, inter alia, of changing costs and improved technology"[264]

The *Blusun v. Italy* tribunal thus also considered the surrounding legal environment of the dispute. In a case of another nature, the tribunal might have considered the Climate Emergency declared by the EU[265], or the various environmental treaties concluded since the entry into force of the ECT. This, paired with the plethora of environmental aspects of the ECT, including the many recommended measures to protect the environment, would allow for states to defend themselves against legitimate expectation claims.

Investor claims based on the state obligation to provide a stable legal framework is closely related to the legitimate expectations – the key issue is whether states have committed to not regulate certain matters through, e.g. stabilisation clauses.[266] Regarding the investor's claims that the Italian measures to change renewable energy incentives breached its obligations of maintaining legal stability, the *Blusun v. Italy* tribunal found that the threshold for such claims is relatively high.[267] It relied on the findings of the *El Paso v. Argentina* and *LG&E v. Argentina* tribunals, which speak of "total alteration of the entire legal setup for foreign investments"[268] and "completely dismantling the very legal framework constructed to attract investors."[269] Thus, it is clear that the threshold for breaching legal stability obligations is high. However, the situation may change in cases of different nature. It seems plausible that state measures to protect the environment, especially if such measures are ambitious, would upend the legal framework more drastically than mere changes to the profit incentives of renewable energy. For example, in *Rockhopper v. Italy*, an ongoing dispute arising from

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[264] *Blusun v. Italy* [371], emphasis added
[265] European Parliament resolution of 28 November 2019 on the climate and environment emergency, accessed at <https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.html> on 2 June 2020.
[266] Fernando dias Simoes, 'Blusun S.A. and others v Italy: Legal (in)stability and renewable energy investments' (2017) 26 Rev Eur Comp & Int'l Envtl L 298, 300
[267] *Blusun v. Italy* [363]
[268] *El Paso v. Argentina* [517]
[269] *LG&E Energy Corp., LG&E Capital Carp, and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) [139]

Italy's ban on coastal oil drilling[270], it is plausible that the investor would claim that the state measure would breach its obligations to maintain legal stability, as it would not merely cut profits, but prohibit a certain type of conduct altogether.

In such cases, a state ought to base its arguments on the fact that ECT does not contain an explicit stabilisation clause, but rather the general obligation not to subvert the legal regime.[271] A state could also, based on this finding, argue that measures to protect the environment can hardly constitute a subversion of a legal regime, as the ECT and most national constitutions[272] contain provisions regarding the protection of the environment. Thus, the question the tribunal must answer to in such cases, is how broadly the concept of legal regime is understood. Is it the entire regime or a given field of law, or could the alteration of a single law cause such subversion that legal stability has been upended?

Thus far, I have shown that under ECT Article 10 states retain the right to regulate without breaching legitimate expectations or legal stability, unless the state has made specific commitments. However, Article 10 sets out limitations to this power – any such regulation must not be unreasonable or discriminatory towards foreign investors. This means that for the state to avoid breaching the investors' rights, the measures must be proportional, i.e. the private loss must be proportionate to the public gain, and that the measures must affect domestic investors as they affect foreign ones. The proportionality test comes into play in particular in situations where the threshold of expropriation is not met, but the investor still wishes to pursue legal relief. European Court of Justice's ("ECJ") jurisprudence on the free movement of goods and persons offers insight as to how these tests are to be understood.[273] The *Danish bottles* case,[274] in particular, proves useful in this. The case concerned Danish law requiring drink containers to be returnable and re-usable to some degree.[275] The ECJ found that albeit the goals were laudable, they nevertheless constituted an indirect limitation to the trade of imported products. Therefore, the measure was disproportioned to the goal of

[270] It has been stated above that Italy has withdrawn from the ECT. However, the ECT Article 47(3) contains a so-called 'zombie-clause', which allows for investors to rely on ECT provisions for 20 years following the date of withdrawal. Thus, it was possible for Rockhopper to lodge its claims under the ECT, even though Italy had withdrawn from the Treaty at that point.
[271] Blusun v. Italy [363] – [364]
[272] David R. Boyd, 'The Status of Constitutional Protection for the Environment in Other Nations' (David Suzuki Foundation 2013) 23
[273] Wälde & Kolo (2001) 827, 832-835
[274] ECJ, *Case 302/86 Commission v. Denmark*, [1988] ECR 4607
[275] Paul Craig & Gráinne de Búrca, *EU Law, Text, Cases and Materials 6th Edition* (OUP 2015) 709

the regulation.[276] Although the aforementioned case concerned the EEC treaty rather than the ECT, it is nevertheless a useful analogy of the obligations as mentioned earlier.

If it seems that state measures affect foreign investors discriminately, the chance that a state could successfully defend its actions based on the environmental aspects of the treaty is seemingly slim. However, if the measures affect foreign and domestic actors similarly, as *bona fide* environmental regulations ought to, the situation changes. Climate change left unchecked would mean such drastic consequences that states may argue for almost any measures to be proportionate in relation to the aim of them.[277] Such defence may not absolve a state's compensation obligation yet may well convince the tribunal to order lower compensations to be paid.

Article 10 is among the most complicated articles in the ECT due to its open formulation. The formulation allows for the tribunal to take into consideration the ECT as a whole, including the environmental aspects. Furthermore, even if a state seems to have breached Article 10 obligations, it is still possible that a state has not breached its ECT obligations, as the exceptions found in Article 24 partially apply to Article 10 as discussed below.

4.3.1.4. Applicability of Exceptions on Environmental Grounds

The Energy Charter Treaty contains several exceptions to the aforementioned investment protection rules found in Article 24. Furthermore, GATT exceptions apply in certain trade situations.[278] Under this heading it is argued that these exceptions could apply in disputes arising from state measures to protect the environment. The focus will be on the aspects of Article 24 that could have significance in the environmental matters, and therefore certain subparagraphs will not be discussed.

Article 24(1) states that its provisions "shall not apply to Article 12, 13 and 29." Thus, as has been stated before, if a state is found to have expropriated foreign investments, it must pay compensations – exceptions do not apply in such situations. Article 24(2) contains a key limitation for the ability of states to rely on Article 24 exceptions to defend their measures to protect the environment. The article states that:

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[276] *Danish bottles* [21-22]

[277] Such interpretation is supported by the ECT preamble, which calls for an "urgent need for measures to protect the environment" as discussed under Chapter 3.

[278] Final Act of the European Energy Charter Conference, Understanding 15: "Exceptions contained in the GATT and Related Instruments apply between particular Contracting Parties which are parties to the GATT, as recognized by Article 4."

> "The provisions of this Treaty other than
>
> (a) those referred to in paragraph (1); and
>
> (b) with respect to subparagraph (i), Part III of the Treaty
>
> shall not preclude any Contracting Party from adopting or enforcing any measure
>
> (i) necessary to protect human, animal or plant life or health."[279]

Part III of the Treaty concerns the promotion and protection of investment and includes Article 10, provisions of which have been discussed above. The strict formulation of Article 24(2)(i) seems, at first glance, rather damning for the argument that measures to protect the environment could fall under Article 24. Arguably, most measures to protect the environment would most readily fit under the scope of measures necessary to protect human, animal or plant life or health.

Such strict formulation offers a high level of protection to investors, especially when compared to the provisions of GATT Article XX relating to trade, Articles XX(b)[280] and XX(g)[281] in particular. GATT is quite explicit on the point that health is more important than trade.[282] Furthermore, GATT allows for exceptions to be made if they are related to the conservation of exhaustible natural resources, such as clean air.[283] The ECT makes numerous references to GATT but takes a notably strict approach in its investment rules when compared to its trade rules. Thus, it seems evident that Article 24 exceptions would not apply if the aim of the contested measure was *only* the protection of the life or health of humans, animals or plants. Such a policy point, which seemingly places more value on the protection of investments than the protection of human lives, is very unusual, as admitted even by the claimant in a rare case where Article 24 was discussed.[284] The tribunal in *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* ("*RWE Innogy v. Spain*") offered the following analysis to make such policy more understandable:

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[279] ECT, Art 24(2)
[280] Measures necessary to protect human, animal or plant life or health.
[281] Measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
[282] Energy Charter Secretariat, *Trade in Energy: WTO Rules Applying under the Energy Charter Treaty* (Energy Charter Secretariat 2001) 52
[283] Ibid 55
[284] *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019) [446]

> "[The Tribunal] considers that the limitation of general exception in Article 24(2) with respect to human life etc is more readily comprehensible if the ECT Contracting Parties understood themselves to be adopting a series of confined investment protections in Part III such that, for example, *a regulation adopted to protect human life would not be regarded as unfair and inequitable unless it was arbitrary or discriminatory* or in some other way contrary to customary international law."[285]

The tribunal's interpretation in *RWE Innogy v. Spain* indeed makes Article 24(2) formulation much more reasonable. The tribunal is effectively saying that *bona fide* measures to protect human life, among other things, should not be found to be in breach of the investment protection provisions of the ECT. Such formulation is certainly more acceptable than the investor's position in the above case that "under the ECT investor protection was being prioritized over the protection of human life."[286]

In any event, should a state measure concerning the protection of the environment be deemed to have breached Article 10 of the ECT, Article 24(3) still allows for the respondent to argue that such measures were lawful under the ECT, as it makes an exception to the exception rules of Article 24(2), by stating that:

> "The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:
>
> (a) for the protection of its essential security interests including those
>
> (i) relating to the supply of Energy Materials and Products to a military establishment; or
>
> (ii) taken in time of war, armed conflict or other emergency in international relations;
>
> (b) …; or
>
> (c) for the maintenance of public order.
>
> Such measures shall not constitute a disguised restriction on Transit."[287]

[285] Ibid, emphasis added
[286] Ibid
[287] ECT Art 24(3)

First of all, it is clear that Article 24(3) exceptions cover Article 10 obligations, as only provisions referred to in paragraph (1) are not within the scope of the Article 24(3) exceptions. Secondly, the formulation of the paragraph confers broad discretion to states as to when the paragraph's provisions would apply. The provisions of the ECT do not prevent any Contracting Party from taking any measure *it considers necessary*, i.e. the ECT contains a 'self-judging' exception regarding security and public order. Whether such a provision is self-judging or not is significant[288], as it has some effect on the level of scrutiny a tribunal assigns such claims. Essentially, self-judging provisions would be subject to a 'good faith review' and non-self-judging provisions would be subject to a more substantive review to examine whether the state of necessity meets the conditions laid down in customary international law.[289] However, it remains unclear as to what the degree of difference between such reviews would be, with the *LG&E v. Argentina* tribunal suggesting that the review would not be significantly different, whether the provision in question were self-judging or not.[290]

Based on the above, if a state can in good faith argue that its measures to protect the environment, which might breach Article 10 obligations, were taken for the protection of its essential security interests or the maintenance of public order, said state may not be held liable for the breach.[291] Although such an interpretation of Article 24(3) would probably have seemed a stretch during the negotiation period in the early 1990s, the plausibility may have increased since. Climate change is widely being recognised as a security issue, rather than only an environmental one, whether it is due to resource shortages, population migration, or other factors indirectly caused by climate change.[292] The self-judging nature of the ECT Article 24(3), and many indirect links between climate change and security could allow for a

[288] Countries such as the USA and Russia have in fact argued that self-judging provisions would actually be jurisdictional questions, and if invoked, the matter would fall outside the jurisdiction of dispute settlement bodies. Such interpretation was, however, rejected by the WTO Panel in *Russia – Measures Concerning Traffic in Transit, Report of the Panel* (5 April 2019) [7.102].
[289] Stephan Schill & Robyn Briese, 'If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13 Max Planck UNYB 110-113.

I disagree to some degree with the invocation of 'state of necessity as laid out in customary international law' as it would effectively render ECT Article 24(3) without significance, as the Article in question would add nothing to rules of customary international law. Thus, I would argue that the threshold of applying Article 24(3) remains high, but not as high as that of the state of necessity as codified in ARSIWA Art 25, and that the concepts of 'measures a state considers necessary' and 'necessity' are kept separate despite their similarities. More on the high threshold of ARSIWA Art 25, see Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 80-84
[290] *LG&E v. Argentine Republic* [214]
[291] Johnson (2009) 11154
[292] Ibid 11155-59

state to argue, that its measures that protect the environment fall under 'measures the state considers necessary to protect essential security interests'. Support for this argument can be found in some courts' jurisprudence: In *Gabčikovo-Nagymaros* the ICJ found that Hungary's concerns for the environment indeed constituted an "essential interest" of the State[293] but the ICJ did not find such concerns to be of "imminent" nature.[294] The US Supreme Court has, however, found in *Massachusetts v. EPA* that even though the negative effects of climate change may occur over a long period of time, it nevertheless creates an actual or imminent risk of harm.[295]

Despite these factors, the highly complex nature of climate change and the high level of protection conferred to investors would make the prospects of such argument highly uncertain at least for the time being.[296] The defence based on security interests still seems better grounded than one relying on the maintenance of public order, which is discussed below.

As has been noted above, the very wording of Article 24(3)(c), to which these interpretations are based on, is unclear. The English version of the ECT speaks of measures that a state considers necessary 'for the maintenance of public order', whereas the French version reads '*au maintien de l'ordre public*'. Albeit the literal translation of *ordre public* is indeed public order, the significance of the French concept of *ordre public* is slightly different and resembles more closely the concept of public policy, rather than that of public order.[297] Whereas 'public order' can be understood as a narrow provision, one concerned with matters such as preventing civil unrest, etc.,[298] the meaning of public policy is much broader. Public policy, as a legal term, concerns situations where the application of foreign law would violate fundamental principles of justice or conception of good morals,[299] and as a more generic term 'public policy' could apply to an even wider array of situations. As both the English and French versions of the text are equally authentic, a respondent may argue based on the much wider concept of public policy. In which case, a state could argue that its measures to protect

[293] *Gabčikovo-Nagymaros Project* [53]
[294] Ibid [55]
[295] *Massachusetts v. EPA*, 549 U.S. 497, 521, 37 ELR 20075 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 22 ELR 20913 (1992)).
[296] Ibid 11159
[297] Gerhart Husserl, 'Public Policy and Ordre Public ' (1938-1939) 25 Va L Rev 37
[298] E.g. United Kingdom's Public Order Act 1986, Finland's Public Order Act (612/2003; amendments up to 774/2010 included)
[299] Gary J. Simson, 'The Public Policy Doctrine in Choice of Law: A Reconsideration of Older Themes' (1974) WASH. U. L. Q. 391, quoting Judge Cardozo in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

the environment fall under public policy. This claim would find support in the fact that the protection of the environment is often codified in the constitutions of states. However, the fluid nature of public policy doctrine seemingly makes it suitable for only the most egregious cases, and even then, the prospects of such an argument succeeding seem poor, as it would arguably broaden the scope of Article 24(3)(c) considerably.

4.3.1.5. Summary

Above I have discussed various approaches a state could take in responding to investor claims targeting their environmental measures. A state would need to combat claims based both on Articles 10 and 13, with defence against Article 13 being the priority, as a breach of expropriation rules obligates the state to pay full compensation. In contrast, breaches of Article 10 usually result in lesser compensation obligations. Although *bona fide* environmental measures should, in most cases, not be deemed to be in breach of the ECT investment protection provisions, sometimes this might be the case. In such situations, states can still rely on Article 24 exceptions to some degree. However, it seems unlikely that the same tribunal that has ruled the environmental measures to be in breach of ECT Article 10 in the first place would then agree on their justifiability based on either essential security interests or maintenance of public order or *ordre public*.

Having identified these varying approaches to the most common investor claims and developed a novel interpretation of the object and purpose of the ECT, I discuss what kind of effect their application potentially would have had in an actual investor-state dispute under the ECT. This is done in comparison with how the dispute in fact played out.

4.3.2. Applying the Findings: Case Study of Vattenfall v. Germany (I)

As discussed above, Bankes and Whitsitt have identified four categories of disputes that arise in the energy sector.[300] In the context of this paper, the third category identified by Bankes and Whitsitt is of primary interest, namely disputes arising from host states seeking to enhance their environmental or social regulatory regimes; and the fourth identified category is of secondary interest, namely disputes that arise when the host states seek to withdraw from policies that incentivise certain ways to produce energy. These types of disputes often have a clear environmental aspect to them, yet the responding state would utilise very different techniques as it would seek to either emphasise the significance of the

[300] See *supra* note 238.

environmental aspects of the ECT, or downplay them, depending on the nature of the contested measures.

There are, however, two main challenges to conducting a thorough case study of ECT disputes in which the interpretations made within this paper would potentially have made a difference. Firstly, ECT disputes are relatively confidential. The parties to an investment arbitration under ECT Article 26 are not obliged to make the existence of a dispute public, let alone to publish any of the documents related to it. Effectively, this means that the available material on disputes is very scarce – although the parties in most known disputes have published the possible awards rendered by the tribunal, there are virtually no disputes in which the memoranda of the parties would have been made public. Therefore, there is no way to accurately assess which arguments have been brought forward by the parties or how they have been presented.[301] Secondly, there is a scarcity of known disputes falling under the third category, and none with a public award to be analysed.[302] On the other hand, several awards have been rendered on disputes falling under the fourth category, in particular relating to the various solar energy incentivisation schemes in various countries. Despite these obstacles, the analysis below is focused on the *Vattenfall v. Germany (I)* dispute, which concerned a coal power plant in Germany. Although there is no public award to be studied, the findings made within this paper can nevertheless be applied to the known facts of the dispute. Investigating a dispute arising from a state seeking to enhance its environmental regime is of particular importance, as it remains largely unexplored by ECT tribunals, and as it seems likely that such cases are becoming more commonplace.[303]

Publicly available information regarding *Vattenfall v. Germany (I)* is scarce as the only public document is the applicant's Request for Arbitration, which offers only the investors' view of the dispute, and the settlement agreement, which does not contain material details. The dispute seemingly arose from Hamburg placing, after the initiation of construction works, further requirements relating to the protection of the waters of the River Elbe, which

[301] Although the tribunals do refer to the arguments made by the parties in their considerations, this is often done passingly and not in great detail. Such practice does not allow for the arguments and their successfulness to be accurately assessed. The confidentiality is glaring especially when compared to NAFTA disputes, where the parties to the disputes make most of the documents public.
[302] Only the following ECT disputes can be characterised to clearly fall under the third category: *Vattenfall v. Germany (I) & (II)*, *Rockhopper v. Italy*, and the very recent *Aura Energy Limited v. Sweden*, arising from Sweden's ban on mining uranium. Out of these disputes, only *Vattenfall v. Germany (I)* has been concluded.
[303] This seems evident, as there are currently at least three active disputes concerning measures to enhance environmental regime, and situations in which the investors have strongly hinted at launching ECT cases against states passing such regulations, e.g. Uniper against the Netherlands for phasing out the use of coal for energy.

according to Vattenfall would have made the operation of the plant uneconomical.[304] Vattenfall claimed that these measures to protect the environment breached Germany's obligations under the ECT, and in their Request for Arbitration alleged breaches of both Article 10 and 13.[305] The parties to the dispute ended up settling the case, however, the details of the settlement are not known publicly.

Had Germany utilised techniques and interpretations resembling those made within this paper, the trajectory of the dispute would arguably have been utterly different, as the joint application of the publicly known facts of the disputes and the findings of this paper would have placed Germany in a position in which it could have litigated the dispute with success, rather than effectively capitulating to the investors' interests by settling the case. This discussion is focused on the merits phase of *Vattenfall v. Germany (I)*.

First, Germany could have made the argument that the object and purpose of the ECT is both the protection of investments and the environment. This is an important step, which serves several purposes by laying the basis for the following arguments which utilise the environmental aspects of the ECT; and by forcing the investors to take stance regarding the object and purpose of the ECT. The applicant would need to downplay the significance of the environmental aspects of the ECT, essentially leading to an argument that the Preamble of the ECT should not be given much importance.[306] It does not seem likely that an argument actively aiming to strip the Preamble of significance would be successful under the ECT regime.[307] Thus, the explicit inclusion of environmental aspects to the dispute would serve to benefit the responding state in disputes that arise from them seeking to enhance their environmental protection regimes.

In *Vattenfall v. Germany (I)* the applicant alleged that the contested measures, namely the stricter requirements for a water permit and extended monitoring period of the power plant's effects to fish stock, would have breached Articles 10 and 13. Thus, the primary objective of the responding state would be to combat the expropriation claims. The applicant would have

[304] Nathalie Bernasconi, 'Background paper on Vattenfall v. Germany' (IISD 2009) 1-2
[305] Request for Arbitration in dispute between Vattenfall AB et al. v. Federal Republic of Germany (30 March 2009) [54]
[306] Such position, though possible, would arguably be undesirable for any investor that emphasises the significance of sustainability and the protection of the environment in its messaging, particularly so, if the award of the tribunal would be published as is the standard practice under the ECT. Vattenfall is such company, as is evident from a glance of its homepage, accessed at https://group.vattenfall.com/ on 20 July 2020.
[307] As discussed above, the preambles of treaties form an important part of the context of a treaty, which must be considered when interpreting them.

needed to argue that the contested measures would have 'destroyed the value' of the investment, as it is evident that the investors would not have lost control or the ownership of the property due to the contested measures. Although the exact content of the stricter requirements is not known, Hamburg has argued that they were set merely to meet the requirements of EU legislation.[308] It seems unlikely that such measures would have rendered the value of the investment worthless, as the investors could have either complied with the regulations and operated the plant more sustainably albeit with higher setting-up costs, or converted it to an altogether different type of power plant.[309] Thus, the respondent would arguably have a high probability of combatting expropriation claims, even without relying on the police powers doctrine, which was touched upon above.

Assessing the investors' Article 10 claims is particularly difficult, as there is scarce public information on the details of the dispute. The investors argued that Germany had breached ECT Article 10 by imposing restrictions under the water permit that are incompatible with earlier agreements; that the investors were not heard properly during the process; and that the extended period of monitoring the fish-stair was an unreasonable measure towards the investors.[310] Overall, the investors have framed the question as entirely politically motivated and have not acknowledged that the respondent may have had legitimate environmental motivations for the measures. Thus, Germany could have argued that the measures were passed due to legitimate environmental concerns, and that investors cannot have legitimate expectations to perpetually pollute at a level that has been acceptable in the past. However, the extended period of monitoring the effectiveness of the fish-stair would potentially be problematic: one-year monitoring period, and Vattenfall building an additional fish-stair had already been agreed upon, and the decision by Hamburg to extend the monitoring period to two years seems arbitrary. As the protection of animal health and life is explicitly stated to fall outside the scope of allowed exceptions to Article 10, it is unlikely that Germany could have successfully relied on Article 24(3) exceptions either, as the health of fish population, albeit important, would be difficult to frame as an essential security interest, or one of maintaining public order. Also, if the investors' right of due process was indeed violated by German authorities, it would be difficult to defend against claims of Article 10 breaches. This

[308] Bernasconi (2009) 1
[309] Some coal power plants have converted to burn biomass instead, although the environmental benefits of this are unclear as it requires the clearing of forests. Another option, one that Germany in particular has explored, is to convert them into batteries to store renewable energy. See https://energytransition.org/2019/05/coal-plants-into-renewable-energy-storage-sites/, accessed on 20 July 2020.
[310] See *supra* note 304.

is, however, difficult to assess as the only piece of documentation suggesting this is provided by the applicant.

As the above analysis is based on the scarcely available information of a settled case, it is bound to be hypothetical. Nevertheless, certain assumptions can be made of the potential result the dispute would have had, had Germany relied on the interpretations and techniques made within this paper. The dispute would not have been settled, and thus the tribunal would have had to take a stance on the significance of the environmental aspects of the ECT, which would have had a significant impact on the field no matter how the arbitrators ruled. It seems likely, that the tribunal would have rejected the applicant's claim of Article 13 breach, as the they would have retained the ownership of the plant, and the investments value would not have been destroyed, even though its value would probably have decreased. It is possible, however, that the tribunal would have found some breaches of Article 10. Although the aims of the measures are laudable, the measures may have been out of proportion for their stated purposes, in particular the doubling of the monitoring period of the effectiveness of the fish-stair. Thus, the result would have likely been that Germany would have been found to be in breach of Article 10 in some ways alleged by the applicant, but not all. The tribunal would have likely ordered some compensation to be paid, but not the full amount claimed by the investors, and the measures to protect the Elbe would be sustained. Whether the now evident falling demand for coal energy[311] would have borne any significance is a different question altogether, as *Vattenfall v. Germany (I)* dispute took place in 2009 when the trend might still have been difficult to predict.

It is possible that had the measures been more specifically targeted towards coal power plants, rather than being vaguely targeted towards industry along the Elbe, the trajectory of the dispute would have been different, and more beneficial towards the respondent. This seems plausible, as the harmfulness of burning coal is well documented, and thus the threshold of measures being unreasonable would arguably be considerably higher in such cases.[312]

4.3.3. Inter-State Disputes

Having discussed the significance of environmental aspects in investor-state disputes, I will now examine their significance in the inter-state context, which, as the *Blusun* tribunal found,

[311] See *supra* note 2.
[312] Should the Netherlands' coal phase out ever be considered by an ECT tribunal, this assessment, and the significance of the falling demand for coal energy, will possible be tested.

is where the environmental obligations found in Article 19 fit. As has been discussed, the formulation of Article 19 obligations makes it fairly difficult for a state to actually breach them – their practical effect seems more relevant as a justification for some state measures. Despite the formulation, disputes concerning their interpretation are nevertheless possible, although no such public case is known. Article 27 of the ECT allows for states to submit their disputes to inter-state arbitration. However, this option does not apply to disputes concerning the interpretation of Article 19, which states in its second paragraph that:

> "At the request of one or more of Contracting Parties, disputes concerning the application or interpretation of provisions of this Article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international for a, be reviewed by the Charter Conference aiming at a solution."[313]

This procedure is considerably weaker than that laid out in Article 27, as it only allows for the Charter Conference to review the dispute, if it does not fall under the jurisdiction of any international forum. Thus, the dispute settlement mechanism for Article 19 obligations is rather weak. Furthermore, the Article 19 obligations themselves are relatively weak as well, as discussed above in Chapter 3. These factors paired means that it is improbable that environmental aspects of the ECT would be of much use in reinforcing legal claims that another Contracting Party would have breached their Treaty obligations.[314]

[313] ECT Art 19(2)
[314] Shine (1996) 536-537

5. Why the Environmental Approach to ECT should be adopted, and is it enough?

5.1. Introduction

Thus far, I have established that the ECT *can* be interpreted in a more environmentally conscious way[315] and *how* such interpretation could be used in practice.[316] To answer these questions, the Treaty itself has been examined – the discussion has been about the text, provisions and application of the Treaty. Under the current chapter, however, I discuss why such interpretation should be utilised, and whether this is enough, or does the Treaty require changes to its text. To do so, I needed to investigate the broader context in which the Treaty is situated, and therefore at times steer away from a purely doctrinal method. I have examined the jurisprudence of various courts and tribunals in order to identify if there is a trend towards a more sustainable interpretation of the law more broadly, and whether more recently drafted investment treaties contain stricter language concerning the environment. Identifying such trends is of importance as it is arguable that states responding to ECT claims would be more willing to rely on the presented arguments, and tribunals would be more willing to accept them, if they can be presented as a part of the continuum of legal development in the field.[317] In essence, a more widespread application of the interpretation presented in this text would allow for states to abandon fossil fuels faster, and focus on renewables and, therefore, I have discussed the benefits of this transition, although such policy considerations have been kept brief. Finally, I have considered if what has been presented in this text would provide for a way forward that would not jeopardise either the environment or the protection of investments; or if the Treaty indeed requires changes in order to balance these two aspects.

5.2. Are Environmental Aspects gaining more Significance in various Disputes?

5.2.1. Cases under the ECT

Several ECT cases have been referred to over the course of this text, with the tribunals of the more contemporary ones beginning to, albeit passingly, consider environmental aspects of the cases. The numerous Spanish solar cases, many of which are still ongoing, and the tribunals'

[315] Chapters 2 and 3.
[316] Chapter 4.
[317] This was touched upon already under the introductory chapter to this paper. The reliance on precedence and analogy is widely used in the field of investment arbitration, and thus it is important to identify the very latest strands in this field.

treatment of various arguments put forward by the parties offers some evidence of environmental aspects gaining significance in ECT disputes. In *Eiser v. Spain* the tribunal found that, "ECT's emphasis on developing secure long-term energy cooperation is coupled with provisions addressing the environmental aspects of energy development" and continues by referring to the entire Article 19(1) of the ECT.[318] In *RWE Innogy v. Spain* the tribunal found that measures to protect human, animal or plant life or health would not breach ECT Part III protections per se.[319]

Despite these current hints of environmental aspects seeping into the tribunals' decisions, there has not been a true landmark ECT award that would have pitted the interests of the investors strictly against the protection of the environment. *Vattenfall v. Germany (I),*[320]which is discussed above, had the potential to be such a case that would clarify the significance of the environmental aspects of the ECT. The case, however, never produced a public award, and the parties instead settled the dispute, with Germany backing on the environmental requirements, yet not admitting any wrongdoing.

It seems that the tribunals applying the ECT are beginning to consider its environmental aspects more regularly and that this is a very recent trend. However, the discussed disputes do not concern situations where the environmental aspects would take a more central stage in the dispute. Until such public dispute arises under the ECT regime[321], the environmental aspects of the ECT slowly gain more significance, albeit seemingly at an increasing pace.

5.2.2. Cases and Wordings under other Treaty Regimes

There have been several investor-state disputes arising from environmental measures under other investment treaty regimes, in particular in North American Free Trade Agreement ("NAFTA") context.[322] A detailed investigation and analysis of NAFTA 'jurisprudence' is outside the scope of this paper. However, NAFTA tribunals have followed similar reasoning to ECT tribunals when considering expropriation claims stemming from environmental

[318] *Eiser Infrastucture Limited and Energia Solar Luxembourg S.À.R.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017) [100].
[319] *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019) [446]
[320] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6)
[321] Of the current publicly known cases, the dispute between Rockhopper and Italy arising from Italy's ban of coastal oil drilling is perhaps the most potential for further clarifying the significance of the ECT's environmental provisions.
[322] Philippe Sands et al, *Principles of International Environmental Law* (Cambridge University Press 2018) 905

measures, often finding that expropriation is dependent on the results of a given measure, not on the justification of said measures.[323] There is, however, a notable exception to such findings: In *Methanex v. United States*,[324] a dispute which arose from California's ban of certain substances, which used methanol as a key component. Methanex, a major producer of methanol, claimed, among other things, that the ban was an act tantamount to expropriation and initiated arbitration proceedings in 1999.[325] The tribunal rejected each of Methanex' claims, and in its findings concerning expropriation stated that:

> "As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation"[326], and further added that:
>
> "No such commitments were given to Methanex. Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, nongovernmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons"[327]

Although I agree with the conclusion of the *Methanex v. United States* tribunal that there was no expropriation, I find the reasoning problematic. It seems likely that the tribunal could have reached the same conclusion through the already established, and strict, test on whether the ownership of the investment has been transferred, or if the value of the investment has been

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[323] Various tribunals have reached this conclusion when discussing state measures to protect the environment, e.g.: *Metalclad Corporation v. The United Mexican states*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) [102-112]; and
Glamis Gold Ltd v. United States, Award, NAFTA Chapter 11 Arbitral Tribunal (8 June 2009) [536].
[324] *Methanex Corporation v. United States of America*, In the Matter of An Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal (7 August 2005)
[325] Howard Mann, 'The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles' (IISD 2005) 2
[326] *Methanex v. United States*, Final Award of the Tribunal, Part IV, Chapter D [7]
[327] Ibid [9]

destroyed – in Methanex, neither of these had happened. Instead, the tribunal relied on a test that is seemingly more apt to FET claims – whether a state has made a specific commitment to refrain from certain regulatory measures. As disputes concerning states' measures to protect the environment are often approached through expropriation claims, *Methanex v. United States* can be seen as a significant milestone in allowing states more policy space. However, in practice, it has had a somewhat limited impact on investor-state disputes, as it did not manage to establish a new test that could be applied to determine which measures are 'permissible and non-compensable'.[328] It is possible that the Methanex tribunal was too ambitious in its reversal of preceding case law as it did not formulate an applicable test – as can be seen from more recent ECT cases, such as *AEG v. Hungary* and *Charanne*, the ECT tribunals have continued to rely on the test of whether the value of the investment has been destroyed.

Outside of actual disputes, it is also worthwhile to briefly examine the relevant provisions of more recent treaties and compare those to the provisions of the ECT. Comprehensive Economic and Trade Agreement ("CETA")[329], in particular, takes a much more clearly pronounced stance on states' right to regulate. In Article 8.9 CETA states that:

> "1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
>
> 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section."[330]

To further accentuate the above point, in CETA Annex 8-A concerning expropriation, it is stated that:

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[328] *Saluka Investments BV (the Netherlands) v. Czech Republic*, UNCITRAL Partial Award (17 March 2006) [262] – [263]; Sands et al (2018) 910-913

[329] Comprehensive Economic and Trade Agreement (CETA), Brussels 14 January 2017, Official Journal of the European Union L 11/23

[330] CETA Art 8.9 – Investment and regulatory measures

> "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."[331]

It is evident that CETA is much more progressive in the acknowledgment of environmental matters than the ECT. This is particularly clear in the above segments. CETA is very explicit on guaranteeing the states' right to regulate, whereas the ECT remains relatively quiet about the matter in its primary texts. CETA's approach to expropriation is very different from that of the ECT. The Energy Charter Treaty Article 13 states that measures that expropriate or have an effect equivalent to expropriation trigger the state obligation to pay full compensation, with Article 24 further stating that none of the exceptions apply to Article 13. CETA, on the other hand, explicitly states that measures that are designed and applied to protect legitimate public welfare objectives, e.g. environment, only rarely constitute expropriation. Although the text of the two treaties differs greatly in this regard, the arbitral practice under the ECT narrows the divide – arbitrators applying the ECT have found expropriation to have taken place very rarely, as has been discussed.

Furthermore, the ongoing negotiation process of the free trade agreement between the European Union and Mercosur states (Argentina, Brazil, Paraguay and Uruguay) ("EU-MERCOSUR") arguably offers some evidence of environmental matters as a global interest gaining more significance in international trade law. In 2019, during the Amazon fires, several European countries implied that they would block the treaty unless Brazil took concrete action to protect the Amazon rainforest.[332] Although the EU-MERCOSUR is not fully comparable to the ECT, as it is not an investment treaty, but rather a trade agreement,[333] it is nonetheless important to recognize that several ECT parties are willing to block a treaty which has been negotiated for some 20 years over environmental concerns.

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[331] CETA Annex 8-A – Expropriation

[332] Graham Fahy & Gabriela Baczynska, 'EU piles pressure on Brazil over Amazon fires' (*Reuters*, 23 August 2019) accessed at <https://www.reuters.com/article/us-eu-mercosur-ireland/eu-piles-pressure-on-brazil-over-amazon-fires-idUSKCN1VD0PJ> on 16 June 2020.

[333] "The agreement extends to all modes of supply. It also covers investment liberalisation ('establishment'), both in the services and non-services sectors. It does not include investment protection standards or dispute settlement on investment protection. "New EU-Mercosur trade agreement: The agreement in principle (Brussels 1 July 2019) 9.

5.2.3. Other Cases

Under this heading I will discuss some very recent case law in an attempt to find further evidence on whether environmental values have seeped into the interpretation or application of the law. As national courts tied many of the referred cases, it is unlikely that they would be referred to in a given ECT dispute, although the arbitrators would certainly be allowed to do so as discussed above. This, however, is not problematic, as the object of the current chapter is to identify whether there is a broader trend towards a more environmentally sound application of law; it must be remembered that the ECT does not exist in a void. The cases discussed under this heading do not consider concepts such as expropriation or FET. Instead, the discussion is now geared towards the general trends in law around the world.

To immediately break with what was just stated about recent cases tried in natural courts, I will briefly discuss the ICJ case *Gabčikovo-Nagymaros,* which, fittingly for the current paper, concerned an energy infrastructure project along the river Danube. In paragraph 140 of its judgment, the Court stated that:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for the mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weigh, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[334]

This ruling is significant as it confirms that there is a trend of environmental values, such as the concept of sustainable development, gaining significance in the application of the law. Essentially, the ICJ rewrote parts of the treaty between Hungary and Czechoslovakia to consider the concept of sustainable development it had invoked for the very first time.[335]

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[334] *Gabčikovo-Nagymaros Project* [140]
[335] Philippe Sands, 'International Courts and the Application of the Concept of "Sustainable Development"' (1999) Max Planck UNYB 392-394

Since *Gabčikovo-Nagymaros* the ICJ has considered other environmental cases as well, but perhaps the clearest evidence of the interpretation and application of the law becoming more environmentally conscious can be found from cases tried in a national setting, a phenomenon known as climate litigation. In a recent landmark *Urgenda* case[336] the court ordered that the Netherlands must reduce its greenhouse gas emissions by the end of 2020 by at least 25% compared to 1990. The court found that under ECHR Articles 2 (right to life) and 8 (right to private and family life) the state is obligated to protect the enjoyment of these rights from the threat posed by climate change.[337] The court further found that in order to protect these rights, each state must 'do their part', meaning that a state cannot escape the responsibility by arguing that their emissions are small on a global scale and thus reducing them would yield little global benefits.[338] Based on various international conferences held in the context of the United Nations Framework Convention on Climate Change (UNFCCC), the court established that 'doing their part' constituted a 25% reduction in emissions for the Netherlands when compared to 1990.[339] *Urgenda* is significant, as it confirms that the states have an obligation of result to reduce their emissions, rather than an obligation of conduct. Despite the ruling taking place in a national context, it might well have significance in future ECT disputes, and has already spawned a number of similar litigations in various countries.[340]

Another significant climate litigation case is currently ongoing in Norway. The so-called *People v. Arctic Oil* dispute concerns drilling licences granted by Norway, and the demand of various environmental organisation that they are revoked. The environmental organisations argue that the licences are unlawful with regards to Article 112 of the Norwegian Constitution (right to a healthy environment) or, in the alternative, in breach of the aforementioned Article 2 and 8 of the ECHR.[341] Although the argument made in *People v. Arctic Oil* is relatively similar to the one made in *Urgenda* in terms of the ECHR, a key difference is that while *Urgenda* concerned general emissions, the case at hand involves specific emissions.[342] The Supreme Court of Norway has since granted appeal so the final ruling might still change.

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[336] Supreme Court of The Netherlands, *The Netherlands v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, Judgment (20 December 2019)
[337] Ibid [5.2.1.-5.5.3].
[338] Ibid [5.6.1-5.8].
[339] Ibid [6.1.-7.3.6]
[340] See <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/> accessed on 17 June 2020
[341] 18-060499ASD-BORG/03, Notice of Appeal to Supreme Court of Norway, 24 February 2020, 2-3
[342] Borgarting Court of Appeal, 18-060499ASD-BORG/03, Judgment (23 January 2020) 35

5.2.4. Summary

I have discussed only a handful of cases above. With the scope of the discussion covering rulings and awards from various investment tribunals, international courts and domestic courts, it is evident that the presented case law represents only a small number of all environmentally significant cases around the world. There is, however, an identifiable trend towards environmental values gaining foothold in the application of the law. The growing field of climate litigation itself is evidence of this, and the success of the claims in *Urgenda* in particular. This trend has not, as evidenced by publicly known cases, affected foreign investment law as significantly yet. However, the language in the more recent investment and trade treaties shows that environmental aspects are becoming more significant in the field as well. This trend is also recognisable within the ECT context, with *RWE Innogy v. Spain* being perhaps the strongest, and a very recent, indication of this.

5.3. Policy Considerations

From a policy point of view, there are various reasons *why* the findings of this paper ought to be applied in state and tribunal practice. Most importantly, it would allow for states to more confidently pass *bona fide* environmental measures, and thus aid in addressing climate change. It seems plausible that such environmental measures will become more commonplace in any event, as the 'increasingly urgent need for measures to protect the environment' referred to in the Treaty[343], is arguably becoming more urgent than ever. With such measures likely becoming more commonplace, the findings of this paper would offer a novel take on balancing the interests of the investor and the environment. Finding such balance is essential, as the common factor to all energy projects is that they tend to require plenty of capital and a long timeline.[344] Thus, the interests of the investors must also be considered even when discussing the environmental aspects of the ECT, as foreign investment in the energy sector still have an important role. I did not fully embrace the *Methanex* award as mentioned earlier partly due to this reason – the tribunal's findings, if widely applied, could lead to a high degree of unpredictability, especially for the foreign investors. The formulation offered within this paper, however, arguably would provide for predictability in a more sustainable manner, as it does not aim to upend the established practice, but rather nudge it towards a more sustainable path by adding the consideration of environmental aspects to the established tests, rather than formulate new tests altogether.

[343] ECT Preamble
[344] Whitsitt & Bankes (2013) 210

Although the cost of producing renewable energy has lowered considerably since the negotiations and entry into force of the ECT, coal remains the cheapest, and most polluting, method of producing energy.[345] Thus, states still have an incentive to use coal rather than renewable forms of energy, as it would grant them a competitive edge to some degree.[346] This creates a dynamic, in which measures to protect the climate benefit all states, but the cost would be borne only by the state passing such measures. This dynamic might lead to states concluding that it is not their obligation to bear these costs, and thus embrace cheaper, more polluting forms of energy.[347] This arguably creates a type of *n*-person prisoners' dilemma: the global utility would increase the most if all states passed measures to protect the environment. However, a state may be able to gain more benefits by not passing such regulations and trusting that other states will do so.[348] Such conduct may then lead to mutual distrust among states, and that none or only a few of them pass such measures, leading to a worse global utility. However, a key component of traditional prisoners' dilemma is that the prisoners cannot communicate – states can, and certainly should,[349] communicate with each other to find the best solutions. Therefore, the higher the number of states that truly strive towards sustainability in the energy sector, the lower the relative costs associated with the benefits are for each such state. Thus, the sooner states begin applying a novel interpretation of the ECT, like one presented within this text, the sooner others may follow them in practice leading to global benefits.

5.4. Should the Energy Charter Treaty be amended?

Thus far in this text, I have investigated the ECT framework as it currently stands and aimed to find an interpretation of the Treaty that would strike a balance between the protection of the environment and investments. Such interpretation, and potential for its application, was found, mainly relying on the teleological approach of interpretation, although never going against the actual text of the Treaty itself. The fact that such balancing interpretation can plausibly be made means that changes to the ECT are not absolutely necessary – the Treaty in

[345] Tomas Kåberger, 'Progress of renewable electricity replacing fossil fuels' (2019) Global Energy Interconnection, Vol 1, Issue 1, 48-52
[346] The competitive edge would be relevant to the degree that the state considers the savings in the price per unit of energy to surpass the reputational damage that a reliance in coal power would arguably carry.
[347] The US withdrawal from the Paris Agreement shows that such *realpolitik* approach to the environment is alive and well.
[348] On prisoners' dilemma in general, and n-person variations of it, see R. Duncan Luce & Howard Raiffa, *Games and Decisions* (Dover Publications 1989) 94-102
[349] Art 19 of the ECT in fact creates some communication obligations for the Contracting Parties regarding their environmental policies.

its current form can serve its purpose of promoting cooperation in the energy sector while protecting both the environment and investments.

However, the consideration is significantly changed when discussing whether the ECT *should* be changed, rather than *must* it be changed.[350] Reforming the ECT has extensive, but not uniform, support amongst the Contracting Parties[351], and environmental NGOs, with the EU's proposal for the modernisation of the ECT being particularly useful.[352] The EU proposes several key amendments to the text of the ECT, a number of which are listed below: 1) adding a new article to the ECT explicitly stating that states retain the "right to regulate within their territories to achieve legitimate policy objective, such as the protection of the environment, including combatting climate change…";[353] 2) a clarification of the scope of the FET clause;[354] 3) reforming Article 13 to resemble the expropriation clause of the CETA, i.e. stating that legitimate public policy objectives "such as the protection of the environment, including climate change…" constitute indirect expropriation only in rare circumstances;[355] 4) a new article solely concerning sustainable development, with mainly soft law obligations, but also some binding obligations;[356] and 5) a new article concerning inter-state disputes arising from the proposed sustainable development -article.[357] In essence, it seems that the EU proposal aims at precisely the same result as the interpretation made within this text: a better balance between the protection of the environment and investments.[358] Therefore, a

[350] It is noteworthy that the ECT contains several obsolete sections, and outdated provisions, which themselves would warrant a modernization of the Treaty: However, the discussion under this heading is focused on whether the environmentally relevant aspects of the ECT should be changed. See CCDEC 2019 08 STR, 45-57

[351] Ibid

[352] Council of the European Union, ECT Modernisation: Revised Draft EU proposal, WK 3927/2020 INIT (Brussels 20 April 2020). Document accessed at <www.euractiv.com/section/energy/news/eu-plans-to-reform-energy-charter-treaty-falling-short-activists-say/> on 24 June 2020.

NOTE: The document WK 3927/2020 INIT is marked for limited use, and was, by all indications, leaked. The decision to nevertheless refer to it was made because 1) it has been on the public domain since the end of April, and still remains findable as of 27 July 2020; 2) the document has already been referred to by an ICSID tribunal, see *Addiko Bank AG and Addiko Bank D.D. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis* (12 June 2020) note 337; and 3) the EU has since published its text proposal for the modernisation of the ECT, which reflects the leaked document, but lacks the explanations for the choices. As the document is already in public domain, and has been referred to already, I decided to utilize it for this research.

[353] Ibid 4-5

[354] Ibid 5-6

[355] Ibid 8

[356] Ibid 10-12

[357] Ibid Explanatory Note

[358] The EU proposal does unfortunately fall short on many accounts, however. As welcome as the proposed changes would be, they would not in fact add much new to the ECT framework, as has been argued throughout this text. The proposal furthermore fails to propose an amendment that would differentiate between renewable and non-renewable forms of energy, which would be an important distinction to make.

large part of the proposed 'changes' would not actually be changing the provisions, but rather explicitly confirming interpretations made within this text, should the proposal pass as is. The EU's proposal for the amendment of Article 13 is the exception to this. The proposed formulation would materially change the provisions regarding expropriation, as the current form is quite clear on that expropriation is identified through the effect of the contested measures, not through the motivation behind the measures. Should Article 13 be changed this way, an award utilising the findings of the *Methanex v. United States* would fit the ECT framework much better than it would currently.

Thus, it is easy to accept that the Energy Charter Treaty should in fact be modernised, so it more would more explicitly take environmental aspects into consideration.

As welcome as modernisation of the ECT would be, it is nevertheless difficult to achieve: Article 36 of the ECT sets that:

> "(1) Unanimity of the Contracting Parties Present and Voting at the meeting of the Charter Conference … shall be required for decisions by the Charter Conference to:
>
> (a) adopt amendments to this Treaty other amendments to Articles 45 and 35 and Annex T;"[359]

Thus, an unanimity of the parties present and voting is required to pass such proposed amendments that would take the environmental considerations more into account. Passing such amendments is quite difficult in the ECT context, as there are over 50 Contracting Parties, and some of them have explicitly stated that they do not consider any changes to the ECT necessary for the time being. Furthermore, as stated in ECT Article 42(4):

> "Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the ninetieth day after deposit with the Depositary of instruments of ratification, acceptance or approval by at least three-fourths of the Contracting Parties."[360]

Thus, passing an amendment, which is challenging in its own right, is not sufficient for the changes to take effect. The amendments also have to be ratified and even then, only affect the Parties that have ratified them. As Verburg has written, the fact that it took 12 years for the relatively unambitious Trade Amendment to come into force in 2010 after its conclusion in

[359] ECT Art 36(1)
[360] ECT Art 42(4)

1998 does not bode well for more ambitious or complicated amendments to the ECT.[361] To summarise, it is evident that ECT should be changed, but any changes to it cannot be taken as granted. Therefore, it is essential to pursue other avenues to reach the stated goal of several Contracting Parties, namely, to strengthen the protection of the environment under the ECT framework.

[361] Cees Verburg, 'Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement' (2019) 20 Journal of World Investment & Trade 425-454, 445

6. Conclusions

Throughout this paper, I have discussed the environmental aspects of the Energy Charter Treaty. Several leading authors have suggested that the environmental aspects of the ECT could have significance in disputes, yet this assertion has received barely any attention. I set out to prove such claim and argued firstly, that the ECT, in its current form, *can* be interpreted in a more environmentally sustainable manner, and secondly, *how* such interpretation might be applied in disputes. Further, I have considered why such interpretation should be applied by the various actors under the ECT regime, and whether it is enough, or if the ECT should be amended. To answer these questions, I have relied on the actual texts of the Energy Charter Treaty and the connected documents; analogous case law; and on the works of academics.

A simple reading of the ECT framework revealed the starting point on which to construct the arguments made in this paper. The ECT framework contains a plethora of environmental aspects, with explicit references to the protection of the environment and sustainable development, among other things, albeit these aspects can mostly be characterised as soft law obligations. One is, however, hard-pressed to find references to these aspects in the publicly available material on investor-state disputes. The *Blusun v. Italy* tribunal offered a partial explanation to this finding – a state can only rely on Article 19 provisions in a reactive manner, rather than proactive. This, however, fails to explain why such arguments have not been made publicly.

Furthermore, the tribunals' findings on the object and purpose of the ECT are often very lacking - practically only recognising the investment protection aspects of the Treaty - or altogether non-existing, effectively leaving the numerous environmental provisions found in the Treaty void of significance. As the Treaty should be interpreted as a whole, and the object and purpose of a treaty has significant importance both in the VCLT's general rule of interpretation, and in the more extensive teleological approach to interpretation. Based solely on the actual text of the ECT framework and considering the wording of Article 2 in particular, I have developed a balanced take on the object and purpose of the ECT. In my formulation, the object and purpose of the ECT has been widened to include both the protection of investments, and the environment, thus arguably respecting the maxim *ut res magis valeat quam pereat*, the rule of effectiveness.

To answer the second question on how the above findings could be utilised in disputes, I formulated litigation techniques suited to respond to the most common investor claims under the ECT, namely alleged expropriation or breaches of Article 10. The text of the ECT and case law of various tribunals suggest that a state cannot successfully rely on the environmental provisions of the Treaty to combat expropriation claims. However, the wording of, and practice concerning, Article 13 reveals that expropriation claims can be successful only in very narrow circumstances. Article 10 provisions, on the other hand, allow for the state to rely on environmental provisions in a number of ways, e.g. by arguing that the environmental provisions contained within the ECT mean that an investor cannot have legitimate expectations that no regulation would be passed, or that environmental regulation would be in breach of the legal stability provision. In fact, the sheer volume of environmental provisions, explicit calls for action to protect the environment, and the examples of measures to protect the environment found within the ECT framework offer a responding state firm ground on which to base their arguments concerning the legality of their measures. Furthermore, Article 10 is subject to numerous exceptions, which plausibly could also cover environmental actions by the state. Relying on such arguments would require the state to embrace the formulation of the object and purpose as presented above. There is a recognisable trend of environmental values gaining a foothold within the law, both nationally, and internationally. This holds true for the ECT as well, as the tribunal in the recent *RWE Innogy v. Spain* arbitration found that measures to protect the life or health of humans, animals or plants should not be found to be in breach of Article 10, unless arbitrary or discriminating.

This thesis has been based on the premise that states would wish to combat climate change, by passing stricter environmental regulations, which might adversely affect their foreign investors. As the implications of the unsustainability of the current emission levels pile up, there is no indication that the premise would be false. That being said, the interpretations and litigation techniques formulated in this paper remain untested. However, there is ample evidence supporting that such arguments could well be successful - ranging from the recent findings of the ECT tribunals, to a broader trend of environmental values gaining foothold in the application of the law, and the EU's public will to amend the ECT to explicitly include as written rules many of the aspects that have been found through teleological interpretation in this paper. As desirable as such amendments to the ECT would be, they seem nevertheless unlikely. Thus, the findings presented above, in particular regarding the recent trends of ECT

arbitrations and the novel formulation of the object and purpose of the ECT, can offer insight to practitioners on how to achieve the goal of finding a more harmonious balance between protecting the environment and the interests of investors. As the climate change progresses steadfastly, it is plausible that the arguments presented within this paper, or some variation of them, will eventually be utilized before an ECT tribunal, and only then will they be truly tested.